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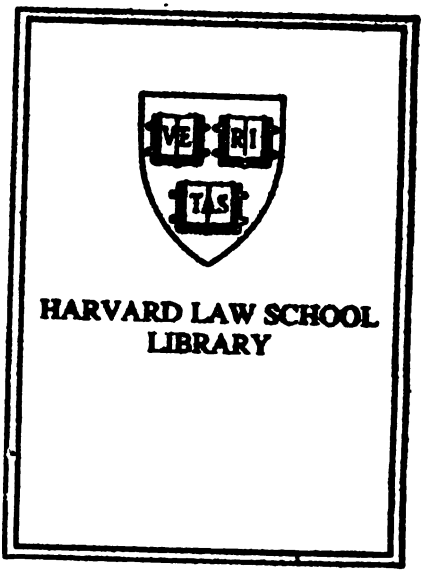

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

MINNESOTA.

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VOL. VI.

CONTAINING THE CASES DECIDED AT THE DECEMBER TERM, 1861.

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OFFICERS

OF THE

SUPREME COURT OF THE STATE OF MINNESOTA,

DURING THE PERIOD OF THESE REPORTS.

Hon. LAFAYETTE EMMETT, Chief Justice;
" ISAAC ATWATER. } Associates.
" CHARLES E. FLANDRAU, }
GORDON E. COLE, Attorney General.
A. J VAN VORHES, Clerk.
HARVEY OFFICER, Reporter.

JUDGES OF THE DISTRICT COURT.

Hon. S. J. R. McMILLAN,	Judge	1st	Judicial	District.
" E. C. PALMER,	"	2d	"	"
" THOMAS WILSON,	"	3d	"	"
" C. E. VANDERBURG,	"	4th	"	"
" N. M. DONALDSON,	"	5th	"	"
" L. BRANSON,	"	6th	"	"

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RULES OF PRACTICE

IN THE

DISTRICT COURTS

OF THE

STATE OF MINNESOTA.

ADOPTED IN GENERAL SESSION OF THE JUDGES OF THE DISTRICT COURTS OF THE STATE OF MINNESOTA, HELD AT THE CAPITOL, IN THE CITY OF SAINT PAUL, ON THE FIRST WEDNESDAY OF JULY, 1862, PURSUANT TO AN ACT OF THE LEGISLATURE OF SAID STATE, ENTITLED "AN ACT REQUIRING DISTRICT JUDGES TO ADOPT GENERAL RULES OF PRACTICE IN CIVIL ACTIONS FOR THE SEVERAL DISTRICT COURTS," APPROVED MARCH 1ST, 1862.

RULE 1.

Applicants for admission to practice as attorneys and counsellors of this court, who are entitled to examination, shall be examined in open court, at such time and in such manner as the court may direct.

RULE 2.

To entitle an applicant to examination, he must prove to the court :

1. That he is a citizen of the United States, or has declared his intention to become such, that he is twenty-one years of age, and a resident of the district in which he applies, which proof may be made by his own affidavit of the fact.

2. The evidence of good moral character shall be the certificate of a reputable counsellor of this court, or of some other person

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known to the court; but such certificate shall not be deemed conclusive evidence, and the court must be satisfied on the point after a full examination and inquiry.

RULE 3.

The clerk shall administer to each attorney and counsellor, on his admission, the following oath:

"You do solemnly swear that you will support the Constitution of the United States, and the Constitution of the State of Minnesota, and that you will conduct yourself as an attorney and counsellor in the courts of this State in an upright, courteous and gentlemanly manner, and to the best of your learning and ability, with all good fidelity as well to the court as to the client. That you will use no falsehood or deceit, nor delay any person's cause for lucre or malice: so help you God."

RULE 4.

All bonds, undertakings, and other securities in writing, shall be duly proved or acknowledged in like manner as deeds of real estate, before the same shall be received or filed.

No practicing attorney or counsellor at law shall be received as a surety on any bond or undertaking required in an action, except where such bond or undertaking shall be executed on behalf of a non-resident party.

RULE 5.

No affidavit shall be sworn to or pleading verified in any action before the attorney of record therein.

RULE 6.

On process or papers to be served, the attorney, besides subscribing or endorsing his name, shall add thereto his place of residence; and if he shall neglect to do so, papers may be served on him through the mail by directing them according to the best information that can conveniently be obtained concerning his residence.

This rule shall apply to a party who prosecutes or defends in person, whether he be an attorney or not.

RULE 7.

In all cases of more than one distinct cause of action, defence, counterclaim or reply, the same shall not only be separately stated

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but plainly numbered—and all pleadings not in conformity with this rule may be stricken out on motion.

RULE 8.

The attorney or other officer of court who draws any pleading, affidavit, case, bill of exceptions or report, decree or judgment, exceeding two folios in length, shall distinctly number and mark each folio of one hundred words in the margin thereof, and all copies either for the parties or court shall be numbered or marked in the margin, so as to conform to the originals. And if not so marked and numbered, any pleading, bill of exceptions or case, may be returned by the party on whom the same is served.

RULE 9.

Notices of motion shall be accompanied with copies of the affidavits and other papers on which the motions are made, except papers in the action of which copies shall have been served, and papers on file at the service of the notice which shall be referred to in the notice. When the notice is for irregularity, the notice shall set forth particularly the irregularity complained of: in other cases it shall not be necessary to make a specification of points, but it shall be sufficient if the notice state generally the grounds of the motion.

RULE 10.

Whenever notice of a motion shall be given or an order to show cause served, and no one shall appear to oppose the motion or application, the moving party shall be entitled, on filing proof or admission of service, to the relief or order sought, unless the court shall otherwise direct. If the moving party shall not appear or shall decline to proceed, the opposite party, on filing like proof of service, shall be entitled to an order of dismissal.

RULE 11.

On motion, the moving party and on order to show cause, the party cited shall have the opening and closing of the argument. Before the argument shall commence, the moving party in the motion or order shall introduce his evidence to support the application; the adverse party shall then introduce his evidence in opposition; and the moving party may then introduce evidence in rebuttal or avoidance of the new matter offered by the adverse

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party. On the hearing of such motion or order to show cause, no oral testimony shall be received.

RULE 12.

Motions to strike out or correct any pleading under section 80, of chapter 60, of the Public Statutes, page 542, must be noticed before demurring or answering the pleading, and within twenty days from the service thereof.

RULE 13.

The clerk in each county shall keep a special term calendar, on which he shall enter all actions or proceedings noticed for special term according to the date of issue or service of notice of motion. Notes of issue of all matters for special term shall be filed with the clerk one day before the term. And no case shall be entered on the calendar unless such note of issue shall have been so filed.

RULE 14.

All affidavits, notices and other papers designed to be used in any cause at special term shall be filed with the clerk at or before the hearing of the cause, unless otherwise directed by the court.

RULE 15.

Any party applying to any Judge or Court Commissioner for any order to be granted without notice, except an order to show cause, shall state in his affidavit whether he has made any previous application for such order, and if such previous application has been made upon the same state of facts, every subsequent application shall be refused.

RULE 16.

No order extending the time to answer a complaint shall be granted unless the party applying for such order shall present to the Judge to whom the application shall be made an affidavit of merits, or an affidavit of the attorney or counsel retained to defend the action, that, from the statement of the case in the action made to him by the defendant, he verily believes that the defendant has a good and substantial defence upon the merits, to the cause of action set forth in the complaint, or to some part thereof.

RULE 17.

In an affidavit of merits, the affiant shall state that he has fully and fairly stated the case and the facts in the case to his counsel,

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and that the defendant has a good and substantial defence to the action on the merits, as he is advised by his counsel after such statement, and verily believes true, and shall also give the name and place of residence of such counsel.

RULE 18.

In cases where a sale of real estate upon execution or foreclosure by advertisement is sought to be enjoined, the application for an injunction shall be heard and determined upon notice to the adverse party either by motion or order to show cause.

The application shall be made immediately on receiving notice of the publication of the notice of sale. And no injunction in such cases shall be allowed *ex parte*, unless the rights of the applicant would otherwise be prejudiced, nor unless a satisfactory excuse is furnished, showing why the application was not made in time to allow the same to be heard and determined upon notice before the day of sale.

And in all other cases, if the court or judge deem it proper that the defendant, or any of several defendants, shall be heard before granting the injunction, an order may be made requiring cause to be shown at a specified time and place, why the injunction should not be granted.

RULE 19.

In every case where no special provision is made by law as to security, the court or officer allowing a writ of injunction or *ne exeat*, shall require an undertaking on behalf of the party applying for such writ, in not less than two hundred and fifty dollars, executed by him or some person on his behalf, as principal, together with one or more sufficient sureties, to be approved by the court or officer allowing the writ, and to the effect that the party applying for the writ will pay the party enjoined or detained such damages as he may sustain by reason of the writ if the court shall eventually decide that the party was not entitled to the same.

RULE 20.

The qualification of sureties must be as follows: Each must be a resident and freeholder of this State, and worth the amount specified in the undertaking above his debts and liabilities and exclusive of his property exempt from execution. Whenever a judge or other officer approves of the security to be given in any

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case, or reports upon its sufficiency, he must require the sureties to justify by affidavit.

RULE 21.

When a demurrer is overruled with leave to answer or reply, the party demurring shall have twenty days after notice of the order, if no time is specified therein, to file and serve an answer or reply, as the case may be.

RULE 22.

A change of venue or place of trial will not be granted unless the party applying therefor uses due diligence to procure the same within a reasonable time after issue joined in the action, and the ground for the change shall have come to the knowledge of the applicant. Nor will a change be granted where the other party will lose the benefit of a term, unless the party asking for such change shall move therefor at the earliest reasonable opportunity after issue joined, and he shall have information of the ground of such change.

RULE 23.

In cases where the trial of issues of fact is not provided for by section 6, of chapter 61, page 557, of Statutes of Minnesota, if either party shall desire a trial by jury, such party shall within ten days after issue joined, give notice of a motion to be made upon the pleadings, that the whole issue or any specific questions of fact involved therein, be tried by a jury. With the motion shall be served a distinct and brief statement of the questions of fact proposed to be submitted to the jury for trial, in proper form, to be incorporated in the order, and the court or judge may settle the issues, or may refer it to a referee to settle the same. The court, or judge may, in his discretion, thereupon make an order for a trial by jury, setting forth the questions of fact as settled, and such questions only shall be tried by the jury, subject, however, to the right of the court to allow an amendment of such issues upon the trial, in like manner as pleadings may be amended upon trial.

RULE 24.

Commissions to take testimony without this State may be issued on notice, and application to the court, or judge thereof, or court commissioner of the county where the action is pending,

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either in term time or in vacation. Within five days after the entry of the order for a commission, the party applying therefor shall serve a copy of the interrogatories proposed by him, on the opposite party. Within five days thereafter the opposite party may serve cross interrogatories. After the expiration of the time for serving cross interrogatories, either party may, within five days, give five days' notice of settlement of the interrogatories before the court, judge thereof, or court commissioner of the county. If no such notice be given within five days, the interrogatories and cross interrogatories, if any served, shall be considered adopted. Whenever a commission is applied for and the other party wishes to join therein, interrogatories and cross interrogatories to be administered to his witnesses may be served and settled or adopted within the same times and in the same manner as those to the witnesses of the party applying. After the interrogatories are settled, they must be engrossed by the party proposing the interrogatories in chief, and the engrossed copy or copies be signed by the officer settling the same, and must be annexed to the commission and forwarded to the commissioners. If the interrogatories and cross interrogatories are adopted without settlement, engrossed copies need not be made, but the originals or copies served may be annexed and forwarded with the commission.

RULE 25.

Should any or either of the commissioners fail to attend at the time and place for taking testimony, after being notified thereof, any one or more of the commissioners named in the commission may proceed to execute the same.

RULE 26.

The witnesses shall severally subscribe their depositions, and the commissioner or commissioners shall annex to the commission a certificate, showing the time or times and place of executing it, which certificate may be substantially in the following form:

"I, commissioner named in the within and above written commission, do certify that the said commission was executed, and the testimony of was taken before me at in on the day of 186 , at o'clock in the noon, and was reduced to writing by myself, (or by deponent, or by a disinterested person, in my presence and under my direction.)

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"That the said testimony was taken by, and pursuant to the authority and requirements of the said commission, upon the interrogatories annexed and herewith returned. That said witness, before examination, was sworn to testify the truth, the whole truth, and nothing but the truth, relative to the cause specified in said commission, and that the testimony of said witness was carefully read to (or by) said witness, by me, and then by him subscribed in my presence.

"A. B., Commissioner."

And shall also state whether any commissioner not attending was notified of the time and place of the taking of the deposition. The commissioner or commissioners shall annex the deposition, with such certificate, to the commission, seal them up in an envelope, and direct to the Clerk of the Court of the county in which the action is pending. They may be transmitted by mail or private conveyance. The Clerk, on receipt of the same, shall open the envelope, and file it with the commission and depositions, marking thereon the time. They cannot be taken from his custody except upon the order of the court, or of a referee appointed to take proofs or try any issues in the cause. The clerk shall produce them in court to be used upon the trial of the cause upon the request of either party.

RULE 27.

No papers on file in a cause shall be taken from the custody of the clerk, except by the Judge for his own use, or a referee appointed to try the action. Before a referee shall take any files in said action, the clerk shall require a receipt therefor, signed by the referee, specifying each paper so taken.

RULE 28.

On a hearing before referees the plaintiff may dismiss his action, or his action may be dismissed, in like manner as upon a trial, at any time before the cause has been finally submitted to the referees for their decision, in which case the referees shall report according to the fact, and judgment may thereupon be perfected by the defendant.

RULE 29.

Upon a trial of issues by referee, such referee shall file his report in the clerk's office upon his fees being paid or tendered by either party.

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RULE 30.

Where the service of the summons and complaint or notice (if any) accompanying the same shall be made by any other person than the sheriff, it shall be necessary for such person to state in his affidavit of such service, when, at what place, and in what manner he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein.

RULE 31.

At general terms there shall be two calls of the calendar. The first shall be preliminary, the second shall be peremptory. All preliminary motions, except motions for continuance, shall be made on the first call. The cases shall be finally disposed of in their order upon the calendar on the second call. Substitution of cases may be made on the second call by consent of all the attorneys in the cases transposed.

RULE 32.

All motions for continuance shall be made on the first day of the term, unless the cause for such continuance shall have arisen or come to the knowledge of the party subsequent to that day. And in all affidavits for continuance on account of the absence of a material witness, the deponent shall set forth particularly what he expects and believes the witness would testify to were he present and orally examined in court.

No counter affidavits shall be received on motions for continuance.

RULE 33.

On the trial of actions before the court, but one counsel on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up the case to the jury, unless the Judge who holds the court shall otherwise order. Upon interlocutory questions, the party moving the court or objecting to testimony shall be heard first, the respondent may then reply, by one counsel, and the mover rejoin, confining his remarks to the points first stated, and a pertinent answer to the respondent's argument. Discussion on the question shall then be closed, unless the court request further argument.

At the hearing of causes before the court no more than one counsel shall be heard on each side, unless by permission of the

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court. No counsel shall be permitted to speak on the argument of any case more than an hour, without special leave of the court granted before the argument begins.

RULE 34.

The points on which a party desires the jury to be instructed must be furnished in writing to the court before he commences his argument to the jury, or the same may be disregarded.

RULE 35.

It shall not be necessary to call either party, or that either party be present or represented, when the jury return to the bar to deliver their verdict.

RULE 36.

Costs and charges to be inserted in a judgment shall be taxed in the first instance by the clerk, upon two days' notice. And an appeal therefrom may be taken to the court within thirty days after such taxation by the clerk, but not afterwards. When such appeal is taken, either party may bring the same on for determination before the court on notice, or by an order to show cause. On such appeal the court will only review the items objected to, and upon the grounds specified before the clerk.

RULE 37.

Judgments, and copies to annex to the judgment roll, shall in all cases be signed by the clerk, and no other signature thereto shall be required.

RULE 38.

Where a party is entitled to have judgment entered in his favor by the clerk, upon the verdict of a jury, report of referees, or decision or finding of the court, and neglects to enter the same for the space of ten days after the rendition of the verdict, or notice of the filing of the report, decision or finding, (or in case the same has been stayed, for the space of ten days after the expiration of such stay,) the opposite party may cause the same to be entered by the clerk upon five days' notice to the adverse party of the application therefor.

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RULE 39.

Whenever it shall be intended to move for a new trial, (except for irregularity, surprise, or upon the minutes of the Judge) or to review by appeal or otherwise a trial by jury, or by the court, or referees, a case or exceptions, or a case containing exceptions, as may be proper, and the party may elect, shall be prepared by the party intending to make the motion or to review the trial, and a copy thereof shall be served upon the opposite party within the time limited under section 61, chapter 61, page 565, Statutes of Minnesota, unless enlarged by the court or by consent of parties. In case of trial by the court or by referees, the time for serving such case or exceptions shall be computed from the date of service of notice of filing the report, decision or finding. Amendments shall be proposed thereto and served within the time limited under said section, unless enlarged by the court or by consent of parties, and the same shall be settled and adopted as provided in said section. The party procuring a case or bill of exceptions, shall cause the same to be filed within ten days after the case shall be settled, or the same or the amendments thereto shall have been adopted, otherwise it shall be deemed abandoned.

RULE 40.

Motions for a new trial, upon the Judge's minutes, shall in no case be made after the expiration of the term, at which the cause is tried, without special leave of the court.

RULE 41.

If during the progress of the term a juror does not appear and answer when called by the court, the clerk shall make an entry of the default of such juror, and deduct from his time of service the day upon which such default shall have occurred, unless the court for a good cause shall excuse such absence.

RULE 42.

Witnesses shall not be entitled to claim fees in more than one cause at the same time, but they may elect in which case they will claim the same.

RULE 43.

In every action for divorce, the summons shall notify the defendant to appear and answer the complaint within ninety days

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after the service thereof, and the action shall not be brought to trial until the expiration of said period. Nor, in case the residence of the defendant is known, shall such action be brought to trial until satisfactory proof shall be made to the court that a copy of the summons and complaint has been personally served on or brought to the knowledge of such defendant.

RULE 44.

All sales of mortgaged premises under a judgment or decree of the court, shall be made by the sheriff of the county where the premises are situated, whether so specially directed in the decree or not.

The same notice of the sale of mortgaged premises under a decree or judgment of foreclosure and sale shall be given as is required by law of sales of real estate upon execution.

A certified copy of the decree or judgment shall issue to the sheriff, with a brief order thereon endorsed, signed by the clerk, directing him to execute the decree or judgment, which shall be annexed by him to his report of sale.

RULE 45.

In cases where no provision is made by statute or by these rules the proceedings shall be according to the customary practice, as it has heretofore existed in the several district courts of this State.

These rules shall take effect on and after the first day of September, A.D., 1862; and all rules of the several district courts which conflict with the foregoing rules, are hereby abrogated.

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ERRATA.

The following errors have occurred in the publication of this volume:

On page 25, first line of Syllabus, for "ef" read "of."

On page 37, thirteenth line from bottom of page, for "thereafterwards" read "thereafter,"

On page 40, sixth line from top of page, for "and" read "are."

On page 40, sixth line from top of page, for "are" read "and."

On page 40, ninth line from top of page, for "independent" read "inexpedient."

On page 41, eighteenth line from top of page, for "artfully" read "wilfully."

On page 53, fifteenth line from top of page, for "artfully" read "wilfully."

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA

DECEMBER TERM, 1861.

DAVID B. DODGE, Plaintiff in Error *vs.* ELLEN R. HOLLINSHEAD, Defendant in Error.

The certificate of a notary public to the acknowledgment of a deed is not conclusive evidence of the facts certified to by him, but the same may be rebutted by proof.

H. executed, acknowledged, and delivered a mortgage upon certain real estate belonging to the wife. His wife signed the mortgage, and the notary certified that she acknowledged the same on a private examination, separate and apart from her husband. The facts proved that she had never in any manner acknowledged the same, and that she never received any part of the consideration named in the mortgage. *Held*, That the acknowledgment on the part of the wife, required by statute, is an essential part of the execution of the instrument, without which no interest in the estate passes, and without such acknowledgment the mortgage is invalid so far as the separate estate of the wife is concerned.

This is an action of ejectment brought in the District Court of the Second District. Judgment was rendered therein in favor of the above-named Defendant in Error, who was Defendant in said action, and against the Plaintiff in Error, who

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was Plaintiff therein, and the case is now brought to this Court by Writ of Error.

The following is an abstract of the pleadings in said action :

The complaint alleges that on the 26th day of January, A. D. 1860, the Plaintiff became lawfully seized in fee simple of, and ever since has been, and now is, the owner in fee simple, and entitled to the immediate possession of the following real estate in Ramsey county, Minnesota, to wit : Lots 17 and 18 in Block 29, in Rice & Irvine's Addition to St. Paul.

That said premises, at last mentioned date were occupied by and in the possession of Defendant, and her late husband, William Hollinshead, now deceased ; that said premises are now in possession of Defendant ; that Plaintiff has demanded of said Defendant the surrender to him of the possession of said premises ; that Defendant refuses to deliver possession and wrongfully and unlawfully withholds possession thereof from Plaintiff, and demands judgment, that the Defendant surrender possession of said premises to him, and pay him damages for the unlawful withholding of the same, and for rents and profits thereof the sum of $600.

The answer of Defendant denies that Plaintiff was ever seized in fee simple of said premises, or that he ever was the owner of the same, or ever entitled to the possession of the same, or that she wrongfully or unlawfully withholds the possession thereof from the Plaintiff, and avers that she holds possession thereof rightfully.

And further says that at the time of the date and execution of the mortgage hereinafter referred to, and long prior thereto, she was seized in fee simple, and sole owner, and ever since has been and now is so seized of said premises in her own right ; that up to the time of the decease of her said husband, to wit, the 25th day of December, 1860, the said Wm. Hollinshead was in possession of said premises, and occupied the same with his family, consisting of this defendant and their children, and that since said time she has been in possession thereof.

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That as she is informed and believes, Plaintiff claims title to said premises, under and by virtue of a certain mortgage and proceedings thereon, to foreclose the same as herein after stated, to wit :

That the said Wm. Hollinshead and George L. Becker, who were partners, as " Hollinshead & Becker," on the first day of October, 1856, made and delivered to Plaintiff their certain note, bearing date on that day, for the sum of $4,894 75, payable twelve months after the date thereof, with interest at the rate of two per cent. per month.

That the said Hollinshead & Becker, and Susanna J. Becker, wife of said George L. Becker, made and executed a certain mortgage to the Plaintiff, on the 21st day of November, 1856, whereby they conveyed certain real estate in said Ramsey county, of which said Becker was then the owner, and seized in fee simple, to wit : Lots one, two, and three in block thirty, in said Rice & Irvine's Addition to St. Paul, and also claimed to convey thereby, with said last-mentioned property, the premises described in the complaint, to the Plaintiff, upon the condition that if the said Hollinshead & Becker should pay to the Plaintiff said sum, according to the condition of said note, that the same should be void, in the usual form.

That on the 28th day of September, 1858, one Stephen H. Dodge, an assignee of said Plaintiff, caused a notice of the foreclosure of said mortgage to be published in a newspaper called the *Minnesotian*, (a copy of which notice is annexed to and made a part of said answer,) in the city of St. Paul, in said Ramsey county, whereby the said Stephen H. Dodge claimed that there was due on said note and mortgage, at the date of said notice, the sum of $7,650 30-100, and gave notice thereby, that said premises would be sold at public vendue to the highest bidder, on the 15th day of November, 1858, to satisfy said alleged claim, and costs of sale, and alleges that she has no knowledge or information sufficient to form a belief as to how long, or how often, said notice was published.

That on the said 15th day of November, 1858, one George W. Turnbull, a Deputy Sheriff of said county, sold the said premises, with the premises of said Becker, to said Stephen

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H. Dodge, for the sum of $7,919 42-100, and avers that she has no knowledge as to whether the same were sold in separate parcels, except as to the lots of said Becker, which, as she is informed and believes, were so sold for the sum of $1,306,-47 each.

That Defendant is informed and believes that Plaintiff claims to own and hold the estate, title and interest of the said Stephen H. Dodge by some transfer or conveyance unknown to her, and as to which she has no knowledge or information sufficient to form a belief, and claims such adverse interest or title under and by virtue of said mortgage and proceedings of foreclosure.

The answer further stated that Defendant *signed* said mort gage at the time of the date thereof; that at such time and long prior thereto, she was a married woman, being then and since the wife of said William Hollinshead, in his lifetime; that at the time of so signing the same, she did not know the contents thereof, and that they had never been made known to her or explained to her by any one, and that she did not read the said mortgage at the time of signing the same; that she never was separately examined thereto by any officer, nor did she ever acknowledge the same; that said proceedings to foreclose the same were never made known to her, nor had she any knowledge, information or communication respecting the said mortgage or proceeding aforesaid, until she accidentally heard of the same in the early part of the year 1860, while in the State of Pennsylvania, but was up to said time wholly ignorant thereof; and when she heard of said proceedings, she supposed that she had no remedy in the premises, and was without redress; that she never received any consideration for signing said mortgage; that she is informed and believes that no greater sum was due upon said note at the date of said notice of foreclosure than the sum of $6,412, and at the time said premises were offered for sale, no greater sum was due on said note than the sum of $6,446; that no purchase money was ever paid by the said Stephen H. Dodge, or by the said Plaintiff upon said sale.

Said Defendant further says, that at and from the time the said premises were offered for sale, Plaintiff was fully inform-

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ed as to all of said proceedings, and of the facts aforesaid, in connection therewith, and that he never gave any value or other consideration to said Stephen H. Dodge therefor.

And thereupon demanded judgment in her favor, that said proceedings of foreclosure and sale be set aside, and her title and estate freed from the cloud thereof, and for such other relief as might be just and equitable.

The reply of the Plaintiff to said answer denies that said Defendant was, at the time of the date of the mortgage referred to, or prior thereto, the sole owner of said premises, or seized in fee simple thereof, in her own right, but admits that up to the time of the decease of her said husband, said William Hollinshead was in the possession of said premises, and occupied the same with his family, consisting of said Defendant and their children, but avers the fact to be that said William Hollinshead, on and after the 15th day of November, 1858, did occupy said premises with his family, as lessee and tenant of Stephen H. Dodge, up to the 26th day of January, 1860, and after that time until his decease, as the lessee and tenant of the Plaintiff, who since said date has been the owner in fee simple of the same, at the yearly rent of $300, paid quarter yearly, at the end of each quarter, and with the condition that said Hollinshead should pay all taxes that should be assessed upon said property, and avers that said Hollinshead paid rent as aforesaid, at the rate of $75 each quarter of the year during the time aforesaid, with the exception of the quarter that expired next preceding his death, and denies that he or this Defendant have retained the possession of said premises except upon the terms and conditions as above stated, and as lessees as aforesaid, with which conditions the said Defendant, since the death of her said husband, has failed to comply.

And Plaintiff avers that he derived title to said premises under and by virtue of a conveyance by deed from Stephen H. Dodge, executed in due form of law on January 26, 1860, which deed, duly signed, witnessed and acknowledged, was recorded in the Registry of Deeds for Ramsey county, February 6, 1860, at 10 o'clock A.M., in Book "X" of Deeds,

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page 6; and avers that said Stephen H. Dodge derived a title in fee to said premises, through and by virtue of a certain mortgage deed, executed by Wm. Hollinshead and Ellen R. Hollinshead, his wife, and Geo. L. Becker and Susanna J. Becker, his wife, on the 21st day of November, A.D., 1856, to one David B. Dodge, for the purposes and of the terms and conditions in said mortgage deed specified, (a copy whereof is set forth in said reply,) the terms and conditions being, that if the said Hollinshead & Becker, their heirs, &c., should well and truly pay, or cause to be paid, to the said David B. Dodge, his heirs, assigns, &c., the sum of $4,894 75, with interest semi-annually, at the rate of two per cent. per month, according to the conditions of a certain note given by said Hollinshead & Becker to said D. B. Dodge, bearing date October 1, 1856, and due twelve months after date; then the said mortgage to be null and void, otherwise to be and remain in full force and effect. But if default should be made in the payment of said sum, the interest, or of any part thereof, at the time and manner therein specified, the said Dodge in such case was fully authorized and empowered by said grantors, in said mortgage deed, to sell the said thereby granted premises (which are the premises described in the answer herein,) at public auction, and convey the same to the purchaser in fee simple, &c., and out of the moneys arising from such sale, to retain the amount then due on said note, and costs and charges, and pay the surplus, if any, to the mortgagors, their heirs, &c.

And the Plaintiff avers that at the time specified in said answer, the note remaining unpaid, and default having been made in the conditions of said mortgage, the same was foreclosed by the assignee thereof as charged in Defendant's answer, and to that end said assignee caused said notice of foreclosure referred to, and made a part of said Defendant's answer, to be published more than six weeks prior to the day designated for said sale, once in each week in the daily *Minnesotian*, a newspaper published in said Ramsey county, and avers that on the day named in said notice for said sale, the same were sold in separate lots and parcels, and the lots and parcels described in the complaint were bid off by said Stephen H. Dodge separately, for the sum of $2,000

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each, and a certificate of sale given to him, as required by law, and a duplicate of the same duly filed in the Ramsey county Registry; and at the expiration of one year thereafter, no redemption from said sale having been had, the Sheriff of said Ramsey county did execute, in due form of law, and deliver to said Stephen H. Dodge, a deed of said premises, which deed was duly and properly recorded, &c.

The Plaintiff further avers that at the time said Defendant signed said mortgage deed, she well knew the contents of the same, and that the same had been made known and explained to her by the officer who took the acknowledgment thereof, and avers that she was separately examined thereto by said officer, duly qualified and acting as such officer.

The Plaintiff denies any knowledge or information sufficient to form a belief as to the allegation that the said proceedings to foreclose said mortgage were never made known to her, nor had she any knowledge, information or communication respecting either said mortgage or proceedings aforesaid, until she accidentally heard of the same in the early part of the year 1860, while on a visit in the State of Pennsylvania, but was, up to the time last aforesaid, wholly ignorant thereof; and that "when she heard of said proceedings she supposed she had no remedy in the premises, and was without redress." Therefore, he denies said allegations, and every part thereof, and avers that said Defendant received a consideration for signing said mortgage.

And avers that on the day when said premises were sold, there was due upon said note and mortgage the sum of, computing interest, according to the literal terms of said note, $7,871 17, and that none of the parties to said note or mortgage made any objection to the computation of interest upon said note at that rate, although notice was given them that interest was so computed.

And the Plaintiff denies that he from the time said premises were offered for sale, or at any time, was fully or otherwise informed as to all or any of said alleged irregularities in said proceedings, or of all or any of the facts charged in connection therewith, as vitiating said mortgage and sale, or the right of this plaintiff to recover the possession thereof; and

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avers that he gave a complete and valuable consideration to said Stephen H. Dodge for said lots and premises.

Upon the trial, the Plaintiff first offered in evidence the mortgage mentioned in the pleadings, signed by William Hollinshead and Ellen R. Hollinshead and George L. Becker and Susanna J., his wife, to which was attached the following notarial certificate :

TERRITORY OF MINNESOTA, } ss.
COUNTY OF RAMSEY. }

Be it known that on this twenty-first day of November, A. D., 1856, personally came before me William Hollinshead and Ellen R., his wife, and George L. Becker, and Susanna J., his wife, to me personally known to be the same persons described in, and who executed the foregoing instrument, and acknowledged that they executed the same, and the said Ellen R. Hollinshead, and Susanna J. Becker being by me examined, separate and apart from their husbands, acknowledged that they executed the same freely and voluntarily, and without fear or compulsion from any one.

ALEX. BUCHANAN, Notary Public.

The introduction of said deed and evidence was objected to by the counsel for the Defendant, on the ground that no seal was attached to the signature of the officer who purported to have taken the acknowledgment thereof, and therefore the deed was not proven ; and thereupon Alexander Buchanan, the notary whose signature was affixed to the certificate of the acknowledgment of said deed, was called, who being duly sworn, and the said deed being exhibited to him, and his attention being called to his said signature, testified : This is my signature as notary public, and as subscribing witness.

Being cross-examined by the counsel for the Defendant, he said : I think I affixed the signature in my office ; I have no recollection that Mrs. Hollinshead was present ; I affixed it at the request of Mr. Hollinshead ; I have no recollection as to this particular deed. And thereupon said mortgage was read in evidence.

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The counsel for the Plaintiff next offered in evidence the promissory note upon which said mortgage deed is predicated, and also the certificate and proofs of the foreclosure of the mortgage, the Sheriff's deed, and other documentary evidence, showing title in the Plaintiff.

It was admitted by the Defendant that due demand had been made by the Plaintiff prior to the commencement of this action, for the possession of said premises, and that the Defendant refused to surrender the same.

And here the Plaintiff rested his case.

And then the counsel for the defence called Alexander Buchanan, a witness, who being sworn, testified as follows:

Question.—State the facts and circumstances connected with the signature of this mortgage.

Objected to, as varying and contradicting his official act, and incompetent and immaterial, which objection was overruled, and exception taken.

As far as I can recollect the circumstances, Hollinshead & Becker were owing a sum of money to Mr. Dodge; I was their confidential clerk in their office; I think likely Hollinshead & Becker, or both, would come to me and say, "these were their signatures," and I think I would put my signature to the certificate; I know their signatures as well as I know my own; there is an impression on my mind that Mrs. Hollinshead did not acknowledge it personally; I have no doubt that my signature was affixed at the office of Hollinshead & Becker; I should think I did not see her sign it.

Being cross-examined, the witness said:

I took the acknowledgment of many deeds for them; I could not possibly tell *what deeds* I actually took the acknowledgment of; I might have taken the acknowledgment of this deed, but don't think I did; I am not testifying from my recollection in this case, but from the way business was done in that office.

The Defendant's counsel next called Ellen R. Hollinshead as a witness, who being sworn said:

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I am the Defendant, and wife of Mr. Hollinshead; I reside upon the premises in dispute; I do not recollect ever having seen the mortgage before the present time; it has my signature.

All parol testimony tending to contradict or vary the official certificate of the notary, is objected to as incompetent, and objection overruled and exceptions taken.

I know Mr. Buchanan; I never knew that such a paper was brought me; I recollect no circumstances connected with my signing this paper; I first heard of it in Philadelphia in 1859, between the 20th and 25th of December of that year; I had never heard of it before; I never knew that Mr. Hollinshead had given any mortgage upon the property, except a prior one to Mrs. Conduit; I never acknowledged this mortgage before Mr. Buchanan; I never signed but one paper in that office in my life, and that related to another matter which I did know of; it was a matter between Mr. Banfill and Major Fridley and Mr. Hollinshead; I did not acknowledge this mortgage; I am positive I did not acknowledge it at the house; I have always signed at the house such papers as were sent to me; I never acknowledged any of these.

Question.—State whether the contents of that paper were read or explained to you.

Objected to as incompetent and immaterial, which objection was overruled, and exception taken.

Answer.—It never was; no officer ever examined me as to the execution of the instrument, or as to whether it was my act or deed; I never knew until after it was sold that there was a mortgage on the place, and I heard that in Philadelphia, as I said before. Mr. Hollinshead never gave me any information in regard to it.

I supposed it was no use to object then; I never received any consideration or value for signing that mortgage.

Being cross-examined, the witness testified:

I was not accustomed to be called to sign very many instruments; I used to sign everything my husband sent me; I had

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a conversation about the place with Mr. Hollinshead, after my return in 1860.

He said he intended to redeem it, and I supposed I should still have the right to redeem; no compulsion was used to obtain my signature; I never read what I signed; I usually received a note from my husband, asking me to sign the accompanying paper; I would have refused to sign this one—not any other; I always signed papers when they were sent to me.

Patrick O'Brien, being called by the defence and sworn, testified as follows:

I have been a clerk in the office of Hollinshead & Becker since 1854; this is my signature as one of the witnesses; I know Mr. Buchanan; I don't know anything about this deed particularly, but I generally took the deeds over to the house for Mrs. Hollinshead to sign; Mr. Buchanan signed the certificate in the office; I believe deeds were always executed in that way.

Here the Defendant rested her case.

It was admitted by the Plaintiff and Defendant that Mrs. Hollinshead was the owner of the property in controversy in her own right, at the date of the execution of the mortgage to the Plaintiff.

And the Defendant rested her case.

And the jury retired, and rendered the following special verdict:

ISSUES TO BE SUBMITTED TO THE JURY.

1st. Did the Defendant acknowledge the mortgage described in the pleadings?

Answer.—She did not.

2d. Were the contents of said mortgage made known to her at the time she signed the same?

Answer.—They were not.

3d. Were the contents of said mortgage fraudulently concealed from her?

Answer.—They were not.

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4th. Did she sign said mortgage voluntarily, without knowing or reading the contents of the same ?

Answer.—She did.

5th. Was the Defendant ever examined by the notary public, or any other officer, as to the contents and execution of said mortgage ?

Answer.—She was not.

6th. Did the Defendant ever know of the said mortgage and foreclosure proceedings, and if yea, when did she first know of them ?

Answer.—Yes, in January, 1860.

7th. Did the Defendant receive any consideration for signing said mortgage, and if so, what ?

Answer.—She did not.

8th. The conveyance from Stephen H. Dodge to D. B. Dodge was in consideration of the original assignment of the mortgage from D. B. Dodge to Stephen H. Dodge, which was intended as a gift from D. B. Dodge to his son, Stephen H. Dodge.

9th. The notice of foreclosure of said mortgage was duly published the requisite time by law required.

10th. Were the mortgaged premises sold in separate parcels, under said notice, and in pursuance thereof, at the time therein specified ?

Answer.—Yes, they were.

11th.—Were duplicate certificates of sale given as required by law ?

Answer.—Yes, they were.

12th. Have said mortgaged premises been redeemed from said sale ?

Answer.—They have not.

13th.—Did the Defendant remain in said premises, living with her husband, who was lessee of the same from the Plaintiff, after she had knowledge of her rights claimed by the Plaintiff, without asserting the rights claimed by her, and if so, how long ?

Answer.—Yes, she has, since January, 1856.

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14th. Did Stephen H. Dodge bid off said premises at said mortgage sale?

Answer.—Yes, he did.

15th. Has he received a Sheriff's deed therefor?

Answer.—Yes, he has.

16th. Has he conveyed his title, acquired by the mortgage sale and deed, to the plaintiff?

Answer.—Yes, he has.

17th. Is Exhibit "A" the mortgage referred to in the pleadings in this case?

Answer.—Yes, it is.

18th. Did the Plaintiff part with any consideration or value for the said note and mortgage?

Answer.—Yes, he did.

19th. At the time of signing said mortgage, did the Defendant sign her name knowingly, with the intention of mortgaging or conveying the premises in question?

Answer.—No, she did not.

20th. Was the Defendant induced to sign said mortgage by means of fraud or misrepresentation on the part of the Plaintiff, as to the nature of its contents, or in any other respect?

Answer.—No, she was not.

And thereafterwards, upon motion on the part of both Plaintiff and Defendant for judgment upon the verdict, His Honor, E. C. Palmer, Judge of the District Court of the Second Judicial District, in the State of Minnesota, rendered and filed the following decision:

The main question involved in the determination of this motion is whether an instrument purporting to be a mortgage upon the separate estate of a married woman is valid when the same has been signed by the married woman, in ignorance of its nature and contents, and has not been acknowledged in point of fact, though it bears on its face the usual certificate of acknowledgment, duly attested under the seal of a notary public.

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On the trial of the cause it was objected that the notarial certificate was conclusive on the question of acknowledgment, and that parol testimony could not properly be received to contradict it. This objection was overruled, and the testimony admitted under section 26, page 400, of the Compiled Statutes, which reads as follows: "All conveyances, and other instruments authorized by law to be recorded, and which shall be acknowledged or proved as provided in this chapter, * * * * may be read in evidence in any court within this Territory (State), without further proof thereof, *but the effect of such evidence may be rebutted by other competent testimony.*"

The jury found that the notary had certified to what was not true, and that the Defendant had not been examined by him, and had never acknowledged in any form or at any time the execution of said instrument. In view of this leading fact is the instrument valid, and has the foreclosure of it by the Plaintiff given him any title to the premises described therein?

Whatever right a married woman possesses to convey her title to or interest in real estate, is derived solely from statute.

It is not a common law right, and in this respect married women occupy a different position from other persons who labor under no such disability in respect to the conveyance of property. The latter possess a natural right to convey or encumber their property—a common law right which statutes may regulate but not abrogate, and hence such persons are sometimes held to be bound, on equitable grounds, by attempted conveyances of their property, when the requirements of the statute on the subject have not been strictly complied with, but in the case of a married woman, the statute not merely regulates the mode of conveyances, and prescribes certain formalities necessary to be observed to entitle such conveyances to the benefit of the registry law, but it creates the right itself by separating the legal existence of the wife from that of her husband, and clothes her with the power to do what she pleases with her own under certain restrictions and qualifications, which vary in different States, and are more or less important in all. In this State, by our

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Statute, these restrictions and pre-requisites are very important, as showing that the wife still continues under a modified disability in respect to the conveyance of her property, and is still regarded, to some extent, as being under the control of her husband, and liable to be unduly influenced in all business matters by his dominating will and more experienced judgment. Thus she cannot convey at all, except by consent of her husband, and her conveyance must be acknowledged, so as to insure its being her own free, voluntary, independent act. Until it appears that these two things concur, her conveyance cannot be said to possess any legal validity—the law creating her right to convey evidently makes these things essential to her exercise of the right, or rather makes the right dependent on the existence, in point of fact, of the express consent of her husband, and the acknowledged freedom of the wife.

The signing of the instrument is a mere physical act, not indicating, in the eye of the law, even mental consent. It is presumed to have been done under coercion, and can have no effect as a legal act until it receives validity through the means provided by law. It is the acknowledgment, therefore, and not the signature of the married woman that gives validity to her conveyance, and she would be as much estopped to deny her deed, were it properly acknowledged but not signed, (her husband consenting,) as he would be in case his own deed was signed but not acknowledged, and this upon the ground that the essentials of a conveyance, by a married woman, so far as the right and intent to convey are concerned, consists in the consent of her husband, and in the fact of her examination, by an acknowledgment to the proper legal authority, that it is her free, unbiassed will, to part with her property.

Such being the origin and nature of the right of married women to convey property, and the mode and manner prescribed for its exercise, it is obvious that an instrument not executed in substantial, if not strict conformity to the statute, is void as a legal instrument, and cannot be upheld and enforced.

The doctrine is too well settled and familiar to require cita-

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tion of authorities in its support, that, when a right is given or created by statute, and the mode of its exercise prescribed, the provisions of statute must, in general, be strictly pursued, or the act will be void. This principle is peculiarly applicable to cases where persons, long unrecognized as having any legal existence, and suddenly quickened into life are invested with rights and privileges never possessed or granted before; for the very fact that such persons are, as it were, enabled to act in a particular manner, implies not only that it is independent and dangerous for them to act in any other manner, but that the old disability remains.

That this is the true view in relation to conveyances of property within this State, by a married woman resident here, is further apparent from Section 13, page 398, of the Compiled Statutes, which provides that "When any married woman, not residing in this Territory (State), shall join with her husband in any conveyance of real estate situate within this Territory (State), the conveyance shall have the same effect as if she were sole, and the acknowledgment or proof of the execution of such conveyance by her, may be the same as if she were sole."

This section is evidently based on the fact, that the law of other localities on this subject is not similar to our own, and that it is proper to permit a married woman, resident elsewhere, to convey her property, situated here, in the manner in which she might convey, if she were unmarried; but when she resides here, and her person is subject to the laws of this jurisdiction, no such liberty or right is given her. It has been thought best to surround her with safeguards, and to endeavor to counteract and render harmless those peculiar influences to which the marital relation subjects her by provisions which enable her to have a will, and to exercise it freely.

In the case at bar, the Defendant never consented to part with her property, though no fraud was used, nor any undue influence brought to bear upon her, since she signed the mortgage voluntarily, though in ignorance of what it was; yet she never pretended to have any intention to convey her homestead in any manner nor for any purpose. She so far trusted her husband as to sign the paper he sent her, but she

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expressly states that had she known the character and contents of the instrument, she would not have signed it. The circumstances under which her signature to the instrument was procured, and the notary made to certify to the complete execution of the instrument, show that while no actual fraud was contemplated, the result will amount to a fraud upon her if the mortgage be held valid; for the case shows that it was given to secure, not her debt, but an old claim against the firm of Hollinshead & Becker, and that she never received any consideration whatever for the alleged execution of this mortgage upon her own separate property, which at the time was and still is occupied by her as a homestead.

Whatever hardships may exist in this case, and it is undeniable that one party must suffer, is mainly attributable to the failure of the notary to perform his duty in the manner prescribed by law. And while I do not think that either the notary, or the husband of the Defendant, acted dishonestly in the matter, or artfully intended to deceive or defraud either the Plaintiff or Defendant, it cannot but be regretted that so grave a business transaction was so carelessly conducted, and so important an official act was so unfaithfully performed—the result is the same as if actual fraud existed. Upon the whole, therefore, the motion of the Defendant must be granted, and judgment entered in her favor, according to the prayer of her answer.

To which decision and finding of said Court, the Plaintiff, by his attorneys, Sanborn & Lund, objects, and to said verdict, and the ruling of the Court upon the introduction of testimony in said case:

I. Because said decision is contrary to the law of the case and is not supported by the verdict in said action.

II. Because said verdict is erroneous, in that it is against the evidence in the case and the weight of evidence.

III. Because the Court erred in allowing the introduction of incompetent and immaterial testimony on the trial of said cause, which was objected to at the time, as incompetent and immaterial and the objections overruled by the Court.

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Points and authorities of Plaintiff in Error.

I. The certificate of the acknowledgment to a deed affixed thereto by an officer empowered to take acknowledgments, and regular upon its face, is conclusive evidence of the matters contained therein, and cannot be aided or disproved by parol testimony. *Greene vs. Godfrey*, 44 *Maine*, 25; 4 *Greenleaf's Cruise on Real Prop., Title* 32, *ch.* 2, *sec.* 24, *note* 1; *Jameson vs. Jameson*, 3 *Whart.*, 457; *Harrell vs. Elliott*, 1 *Tayl.*, 139; *McNeely vs. Rucker*, 6 *Blackf.*, 475; *Bessett vs. Bessett*, 1 *Har. & McHen.*, 211; *Rigley vs. Howard*, 3 *Har. & McHen.*, 211; *Barrett vs. Shakelford*, 6 *J. J. Marsh*, 532; *Hartley vs. Frosch*, 6 *Texas*, 208; 3 *Peters*, 328; *Bancks vs. Ollerton*, 26 *Eng. L. & Eq.*, 508; *Bancks vs. Ollerton*, 26 *Eng. L. & Eq.*, 543 *and Note.*

II. As between parties to a mortgage, the certificate of acknowledgment is unnecessary to its validity, provided its execution and delivery be proved. 28 *Barb.*, 421, *Watson vs. Campbell*; 3 *McLean*, 362, *Strong vs. Smith;* 2 *Black*, 32, *Waynan vs. Naylor;* 4 *Green*, 82, *Gould vs. Woodward*; 7 *Shepley*, 413, *Beamen vs. Whitney*; 5 *B. Munroe*, 471, *Gregory vs. Ford*; 5 *Blackford* 92, *Stevenson vs. Cloud*; (and in this case without subscribing witnesses ;) 13 *New Hamp.*, 389, *Wark vs. Willard*; 12 *Met.* 157, *Dale vs. Thurlow*; 2 *Foster*, 468, *Brown vs. Manton*; 6 *Mass.* 24, *Marshall vs. Fisch*; 21 *Miss.* 307, *Hill vs. Samuel*; 5 *Cal.*, 315, *Hastings vs. Vaughn*; 17 *Barb.* 662, *Blood vs. Humphrey.*

III. Under our Statute a *feme-covert* has all the ability of a *feme-sole* to acquire, hold and alien her estate, with the single exception that she shall not alienate her lands without the consent of her husband. *Pub. Stat., ch.* 5, *sec.* 2; *Pub. Stat., ch.* 61, *sec.* 105. And it is questionable if she could not exercise these rights without the aid of the Statute. *Blackstone's Com., vol.* 1, *Book* 2, (*Chitty,*) *p.* 236, *note* 12, and the authorities there cited ; *Adams' Eq., p.* 45, and authorities there cited ; *Willard's Eq. Jurisprudence, p.* 643.

And there seems to be no good reason why a married woman, after all her disability to hold and convey real estate

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is removed, with the exception that she must have her husband's consent, should stand in any different position as to rights and liabilities from that of a *feme sole*, or men generally, with that exception.

In this case the Defendant asks the Court to adopt the novel principle that a *feme-covert* may act negligently and carelessly in regard to her separate property, and in such a manner as to induce other and innocent parties to part with their property on the strength of her acts, and when such parties claim their legal rights, which they have every reason to believe she has given them, and upon the strength of which they have acted, the plea of the disability of coverture shall be a bar to them all.

There is no pretence of fraud or imposition in this case, and it would be strange if the disabilities of coverture or infancy could be used to shield parties from their legal and assumed liabilities. 4 *Barb.*, 553, *Strong vs. Skinner.*

IV. When a grantor in a deed of conveyance or indenture of mortgage, claims the conveyance or mortgage to be void, and that she is still the owner of and entitled to the possession of the premises purporting to have been conveyed, with knowledge of all the facts, has silently suffered the grantee, for a long period of time, to act upon the strength of her conveyance, and take possession of the premises, and exercise acts of ownership thereon, relying upon his conveyance, and the acts of acquiescence on the part of said grantor, said grantor is estopped from setting up the illegality or insufficiency of her own acts and deeds, to give the possession and ownership claimed by the grantee.

The law will presume, and in this case it is a matter of fact, that the grantee has been prejudiced under these circumstances.

Points and authorities of Defendant in Error.

I. The alleged mortgage of the Defendant, under which the Plaintiff claims, never having been acknowledged, as required by statute by the Defendant, she being a married woman, was no deed, and absolutely null and void as to her.

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Bacon's Ab., Baron & Feme, I., 2 *vol. p.* 52, *&c., Am. Ed;* 2 *Hilliard on Real Property*, 472, *note;* 2 *Kent's Com.*, 150, *Elliott vs. Piersol*, 1 *Peters*, 338–9; 7 *Curtis*, 606–7; *Martin vs. Dewley*, 6 *Wend.*, 12; *Doe vs. Howland*, 7 *Cowan*, 277; 1 *Peters*, 606; *Evans vs. Commonwealth*, 4 *Serg. & R.*, 272; *State vs. Thompson*, 14 *Serg. & R.* 94; *Jourdan vs. Jourdan*, 9 *Serg. & R.*; 268; *Hawkins vs. Burns*, 1 *Har. & J.*, 573; *Jacob vs. Kramer*, 1 *Har. & J.*, 291; *Jackson vs. Caines*, 20 *Johns*, 300; *Gellett vs. Stanley*, 1 *Hill*, 121; *Jackson vs. Stevens*, 16 *Johns*, 113; *Doe vs. Howland*, 7 *Cow.*, 277; *People vs. Galloway*, 17 *Wend.*, 540; *Jackson vs. Perkins*, 2 *Wend.*, 317; *Jackson vs. Schoonmaker*, 4 *Johns*, 162; *Jackson vs. Tracy*, 12 *Johns*, 469; *Thurman vs. Carman*, 24 *Wend.*, 87 & 92; *Sanford vs. McLean*, 3 *Paige*, 122; *Knowles & McCamby*, 10 *Paige*, 316; *Lucas vs. Cobb*, 1 *Dev. & Balt.*, 228; *Phillips vs. Green*, 3 *A. K. Marsh*, 7; *Linsey vs. Brown*, 13 *Conn.*, 192; *Sibley vs. Johnson*, 1 *Manning*, 380–4; *Demeye vs. Campan*, 4 *Mich*, 565–7; *Stevens vs. Doe*, 6 *Blackf.*, 475; and so generally in all the States, except Massachusetts, where immemorial colonial usage has established a contrary doctrine. *Bowler vs. Schearer*, 7 *Mass.* 21.

Nor is such a deed good by way of estoppel. *Parker vs. Manning*, 7 *T. R.*, 539; *Stephens' Nisi Prius*, and authorities cited, *p.* 713. Nor in Equity. See New York authorities cited.

The Statutes of Minnesota render the acknowledgment of a married woman essential to the validity of her deed, in accordance with the general rule, except where she resides out of the State. *Sec.* 44, *ch.* 34, *Comp. Stats.*, 395; also, *secs.* 2, 12, *and* 13, *ch.* 35, *pp.* 397–8, which are in *pari materia*, and to be construed together; and see *Sec.* 2, of *Act of* 24*th Feb.*, 1770, *Pennsylvania*, *Dunlop's Digest*, 94, and authorities cited.

II. As to the exception of the Plaintiff in Error to the admission of parol proof negating the acknowledgment.

Such an acknowledgment being extra-judicial and exparte, is only *prima facie* evidence of verity. *Jackson vs. Schoonmaker*, 4 *Johns*, 161; *Jackson vs. Perkins*, 2 *Wend.*, 308; *Morris vs. Keys*, 1 *Hill*, 540; *sec.* 26, *ch.* 35, *Comp. Stats.*, *p.* 400.

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There is no other mode of contesting it except by parol—it is analogous to an inquiry into the jurisdiction of the Court. When suit is brought upon a judgment of another State, it is competent to show, as in this case, that the party was never in court or before the officer. *Starbuck vs. Murray*, 5 *Wend.* 149, and authorities cited; *Theodore vs. Blackbourne*, *N.N.* 246; *Benton vs. Burgot*, 10 *Serg. & R.*, 240; *Aldrich vs. Henney*, 4 *Conn. R.*, 280; 1 *Greenleaf on Ev.*, *sec.* 548.

Our Statute allowing the deed or acknowledgment to be rebutted by competent "*testimony*," shows that oral testimony was intended. *Comp. Stats. p.* 400; 2 *Bouvier's Law Dict.*, "*Testimony*," *page* 562.

The certificate of the notary, not being under seal, was not a record, and did not prove the acknowledgment, *per se*. *Sec.* 9, *ch.* 4, *Revised Stats.*, *p.* 44; *sec.* 93, *ch.* 5, *Compiled Stats.*, 133; 1 *Greenleaf's Ev.*, *sec.* 503. And the Plaintiff being required to prove the certificate by oral testimony, it was competent to rebut it by the same kind of testimony. The notary at the same time being a subscribing witness, the Defendant had a right to his testimony as to the execution of the deed.

IV. As to the exception to the refusal of the Court to grant a nonsuit to the Plaintiff, against the objection of the Defendant, the Defendant having set up an equitable counter claim. *Sec.* 24, *ch.* 57, *Comp. Stats.*, 481; *subdivision* 1, *of sec.* 170, *ch.* 60, *Comp. Stats.*, *p.* 554.

V. The equitable counterclaim of the Defendant entitled her to a resale under the facts proved and admitted in the pleadings (in case her defence at law did not succeed), under the decisions of this Court. *Talcott vs. Marston*, 3 *Minn. R.*, 339; *Bidwell vs. Whitney*, 3 *Minn. R.*, 76; *Johnson vs. Williams*, 4 *Minn. R.*, 260.

SANBORN & LUND, Counsel for Plaintiff in Error.

HORN & GALUSHA, Counsel for Defendant in Error.

By the Court.—ATWATER, J. The counsel for the Plaintiff in Error claims that the certificate of the acknowledg-

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ment to a deed, affixed thereto by an officer empowered to take acknowledgments, and regular upon its face, is conclusive evidence of the matters contained therein, and cannot be aided or disproved by parol testimony. Such a rule may have been adopted in some of the States, but certainly not in others, as see 4 *John.*, 161; 12 *John.*, 468; 2 *Wen.*, 308; 1 *Hill*, 540. But in this State we think the Statute conclusive on the subject. *Sec.* 26, *p.* 400, *Comp. Stat.*, provides that "all conveyances and other instruments authorized by law to be recorded, and which shall be acknowledged or proved, as provided in this chapter, * * may be read in evidence in any court within this Territory, without further proof thereof; *but the effect of such evidence may be rebutted by other competent testimony.*" In order to introduce the deed, &c., in evidence, therefore, it must have been acknowledged, when it becomes *prima facie* evidence of the matters to which it relates, but the Legislature has provided that such evidence shall not be conclusive. It was strenuously urged upon the argument, that to permit the certificate of the officer taking the acknowledgment to be contradicted by parol proof, would be productive of the most pernicious results, and greatly tend to unsettle the title to real estate. The objection is not without force, although strong reasons may be urged in opposition to this view; yet the regulation of this matter is, doubtless, legitimately within the scope of the law-making power, and where the Legislature has prescribed the rule which is to govern, courts are not at liberty to disregard it.

As a married woman, at common law, is regarded as incapable of making any contract, so she, of course, can only convey her real estate as authorized by the Statute. The old method of alienation or grant by the wife, by fine and recovery, attended by all the formalities and solemnities usual in courts of justice, illustrates the extreme caution exercised with reference to these acts of the wife; or, rather, the protection thrown around her by the courts in the act of disposing of her real estate. For the main object of this somewhat troublesome and expensive proceeding was not for the purpose of restraining the wife in the disposition of her property, but to see that no improper influences were inducing thereto.

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More recent legislation has dispensed with the unnecessary forms which formerly obtained, but carefully preserved the substance, in providing in nearly, or quite all the States, that some public officer should certify to an examination of the wife apart from the husband, and that she executed the instrument of her own free will, and without fear or compulsion. And upon no branch of the law relating to the rights of persons, have the decisions of the courts been more emphatic and uniform than in holding that the conveyance of real estate by a *feme covert* must be strictly in accordance with Statute, in order to give it validity.

This is an action of ejectment, and the Plaintiff must stand or fall upon his legal title, and cannot invoke the equitable power of the court to enforce the contract which it is claimed the Defendant, Mrs. Hollinshead, has entered into. And, indeed were the form of the action different, no equities are shown as against the Defendant in Error, since she received no consideration for signing the mortgage, nor, in fact, was the mortgage given in consideration of an advance of money, but to secure an old debt or claim against the husband of Mrs. Hollinshead and another. Our inquiry herein, therefore, must be limited to the question as to whether the Defendant in Error has conveyed the premises in dispute in the manner required by law.

Our own statutes have, in several instances, recognized the disability under which the married woman labors in the disposition of her real property, and the undue influence liable to be exercised upon her by her husband in regard thereto ; and have provided that she may dispose of it upon one condition, (the consent of the husband,) and have pointed out the manner in which such conveyance shall be made. The particularity with which the form of an acknowledgment of a conveyance of real estate by a married woman is described, and the fact that in the several instances where such conveyance is spoken of, whether as made directly, or through the intervention of an attorney, this form of acknowledgment is required, is strong evidence to show that the Legislature considered this as of the essence of the execution of the instrument, and necessary to constitute a valid conveyance. In the execu-

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tion of a power by a married woman by grant, such grant shall be acknowledged by her on a private examination, as in case of deed, and shall not be valid unless so acknowledged. (*Comp. Stat. p.* 395, *sec.* 44.) The power to convey her real estate is given to the wife by *sec.* 2, *p.* 397, *Comp. Stat.*, and the manner in which the instrument shall be executed is prescribed in *sec.* 12, *p.* 398, which provides that " when any married woman residing in this Territory (State) shall join with her husband in a deed of conveyance of real estate, situate within this Territory, the acknowledgment of the wife shall be taken separately, apart from her husband, and she shall acknowledge that she executed such deed freely, and without any fear or compulsion from any one." And the Act of February 24, 1857, authorizing married women to convey real estate by power of attorney, (*Comp. Stat.*, *p.* 402,) makes the same provision with reference to acknowledgment by the wife, and legalizing conveyances theretofore made, where the examination of the wife had not been taken separate and apart from her husband. The fact that a special act was deemed necessary to legalize such conveyances, affords strong ground for the presumption, that in the view of the law-making power, at least, such conveyances were invalid. Nor can there be any stronger reason for requiring such examination in the execution of a power of attorney authorizing another to convey, than where the conveyance is made directly by the wife. The object of the acknowledgment is the same in both cases.

That the acknowledgment required by section 12, above quoted, is to be regarded as an essential part of the execution of the instrument, is, I think, further manifest from the language of the next succeeding section. This provides that " when any married woman, not residing in this Territory, shall join with her husband in any conveyance of real estate, situate within this Territory, the conveyance shall have the same effect as if she were sole, and the acknowledgment or proof of the execution of such conveyance by her, may be the same as if she were sole." I think the learned Judge who tried the case below, appropriately remarks on this provision, that " this section is evidently based on the fact, that the law of other localities on this subject is not similar to our

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own, and that it is proper to permit a married woman resident elsewhere to convey her property situated here in the manner in which she might convey it if she were unmarried. But when she resides here, and her person is subject to the laws of this jurisdiction, no such liberty or right is given her. It has been thought best to surround her with safeguards, and to endeavor to counteract and render harmless those peculiar influences to which the marital relation subjects her, by provisions which enable her to have a will, and to exercise it freely."

At the common law two things were deemed essential to enable a *feme covert* to convey her lands: 1st. The concurrence of her husband; and, 2dly, That the act be ascertained in the mode prescribed by law to be voluntary on her part, and not from fear or compulsion of her husband. (4 *Coms.*, 9.) Now it will be observed that our Statute has retained these two requisites in conveyances by married women, the only difference being that the Statute has changed the manner in which these requisites are to be ascertained, and there can be no more reason for holding that the private examination of the wife may be dispensed with, than that the husband need not be joined. And yet it is universally held, that the husband must join in the wife's deed in order to render the same valid. It was held in New York (by a divided Court,) that the husband need not join in a mortgage of the wife's property, but that was based on their statute, which materially differs from ours, and even there it was not claimed that the common law rule requiring the concurrence of the husband, could be dispensed with, save as provided by statute. And such may be considered the settled rule in all or nearly all the States, as well as in England, at this time. Chancellor Kent, in treating of this subject, says: "Upon this view of our American law on the subject, we may conclude the general rule to be that the husband must show his concurrence to the wife's conveyance by becoming a party to the deed, and that the cases in which her deed, without such concurrence, is valid, are to be considered exceptions to the general rule." (2 *Kent's Com.*, 154).

But, in fact, if either of these requisites might be dispensed

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with, there is stronger reason for regarding the acknowledgment of the wife as much the most important, for by reference to the mode of conveyance by fine, it will be seen that the *feme covert* might bar herself and her heirs by a fine levied solely by herself, without her husband, if he did not enter and avoid the estate granted; and the reason given is because she was *examined and had power of the land.* (10 *Coke*, 43.) But I find no instance where a conveyance by the *feme covert*, under that form has been held good for any purpose without the private examination of the wife. The disability of a married woman to convey her lands by deed, was not supposed to arise from want of reason, but because by her marriage she was placed under the power and protection of her husband; and it was upon that ground that the separate examination of such woman on a fine was good, because when delivered from her husband, her judgment was supposed to be free. (3 *Atk.*, 712). The reason for this separate examination exists just as strongly at the present day as ever, since the power and control of the husband over the wife is in theory, if not in practice, the same as it has ever been. And as the great object which the common law aimed at was to ascertain whether the wife, in the transfer of her estate or interest in real estate, acted under fear or compulsion of her husband, so has the same been the paramount object in legislative enactments on the subject, and has been recognized in all the judicial determinations which have been made on the question. In *Gillett vs. Stanley*, 1 *Hill*, 121, where the question arose as to conveyance by married women, Bronson, J., in delivering the opinion of the Court, says: "There was no such acknowledgment as the statute required for passing the estate of a *feme covert*;" and that "without an acknowledgment on a private examination, &c., the deed was a mere nullity." In *Meriam vs. Harsen*, 2 *Barb. Ch.* 232, the question came directly before the Court as to the sufficiency of the acknowledgment by a married woman. The officer certified that "the said Catharine, being examined by me, privately and apart from her husband, acknowledged that she executed the same without any fear, threat, or compulsion of her husband." The word *freely*, required by the statute, was omitted, and it was

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strenuously contended that this was sufficient to invalidate the conveyance. The Court held the acknowledgment sufficient, and that it was not necessary that the certificate should be in the precise words of the statute, but clearly intimating that unless the requirements of the statute had been substantially complied with, the conveyance would not have been good.

The statute of New York, it may be remarked, with reference to the acknowledgment of deeds by married women, is precisely the same as our own, but there is a provision, declaring that instruments not so acknowledged shall be void. We do not understand, however, that this added anything to the force of the statute prescribing the form of acknowledgment, but was only declaratory of the effect necessarily resulting from a failure to comply with the statute. As this right or power to convey is created by statute solely, so all the forms or restrictions imposed by the statute in order to its enjoyment, must be observed and complied with. The adjudications of the Courts of New York upon this question, are, therefore, entitled to the same weight as their decisions upon any other subject where the statute law of the two States is the same. And the same is true of the decisions in many other States, whose statutes are nearly, or precisely the same as our own in this regard. As these decisions are numerous, and nearly uniform, it is unnecessary to examine them at length, or to do more than cite some of the most prominent. *Jackson vs. Cairns*, 20, *John.*, 301; *Jackson vs. Stevens*, 16 *John*, 109; *Jackson vs. Schoonmaker*, 4 *John.*, 161; *Martin vs. Dwelley*, 2 *Wen.*, 9; *Meriam vs. Harsen*, 2 *Barb. Ch.* 232 ; 2 *Kent's Com.*, 167; *Elliott vs. Piersol*, 1 *Peters*, 338; *People vs. Galloway*, 17 *Wend.*, 540; *Sanford vs. McLean*, 3 *Paige*, 122; *Knowles vs. McCamley*, 10 *Paige*, 346; *The Albany Fire Insurance Co. vs. Bay.*, 4 *Coms.*, 9; *Reeves' Domestic Rel.*, *ch.* 8; *Sibley vs. Johnson*, 1 *Manning*, 383; *Dewey vs. Campow*, 4 *Mich.*, 567; *Doe vs. Howland*, 8 *Cow.*, 277; *Clark vs. Graham*, 5 *Curtis*, 173; *Constantine vs. Van Winkle*, 2 *Hill*, 240; *Evans vs. Commonwealth*, 4 *Serg. & R.*, 272; *Steele vs. Thompson*, 14 *Serg. & R.*, 94; *Jourdon vs. Jourdon*, 9 *Serg.*

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& R., 268; *Stevens vs, Doe*, 6 *Black.*, 475; *Mott vs. Smith*, 16 *Cal.*, 533; *Johns. vs. Reardon*, 11 *Mary.*, 465.

It is claimed by the Plaintiff in Error, that even if the mortgage was insufficient to convey the legal estate of Mrs. Hollinshead in the premises, she ought not now to be permitted to set up such defence, having long slept upon her rights, and suffered the grantee to act upon the strength of his conveyance without asserting her claim to the property. It appears from the testimony that she first became aware of the fact that these lots were mortgaged in December, 1859, while in Pennsylvania, and that she thought it was then of no use to object. Aside from the fact that the Plaintiff claims only a legal interest, and sets up no equities against the Defendant, it does not appear that Mrs. Hollinshead has not asserted rights at the first opportunity afforded her, after her knowledge of the existence of the mortgage, nor that since that period the Plaintiff has suffered any injury from her neglect or failure to adopt active measures to have her rights litigated. It is unnecessary, therefore, to decide whether the Court would permit a *feme covert* to assert her legal rights, (in a case like the one at bar,) as against an innocent purchaser, but it certainly would be most safe and prudent for the wife, as soon as informed that her rights are, or are likely to be prejudiced in this manner, to take such measures as may be in her power to prevent the injury to herself, and further loss to others.

The evidence in the case is clear and conclusive, that the contents of this mortgage were unknown to Mrs. Hollinshead at the time of signing the same, that she supposed it to be other property than it actually was; that she never received any consideration for signing the mortgage; that her acknowledgment was taken in no manner whatever; and that she never had any intention of incumbering or conveying her homestead. On her part, not the first element existed as the foundation of a valid contract, unless the physical act of affixing her name to the instrument be considered such. It is true her signature does not appear to have been obtained through any fraudulent representations on the part of any one, yet she is, in fact, defrauded of her property by sustaining the mort-

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gage, and that species of property which the law most jealously guards. And in regard to the disturbance of titles likely to result from holding such a conveyance void, (which was strenuously urged as a reason for sustaining the mortgage,) we are unwilling to believe that many of the like false certificates have found place upon the records of the State. But if such be the case, it is an urgent reason why the Legislature should interfere, by imposing penalties of such severity and certainty as to prevent so flagrant an abuse. And as remarked by the Judge who tried the cause, "whatever hardships may exist in this cause, and it is undeniable that one party must suffer, is mainly attributable to the failure of the notary to perform his duty in the manner prescribed by law. And while I do not think that either the notary or the husband of the Defendant acted dishonestly in the matter, or artfully intended to deceive or defraud either the Plaintiff or Defendant, it cannot but be regretted that so grave a business transaction was so carelessly conducted, and so important an official act, was so unfaithfully performed."

The judgment below must be affirmed.

GERRISH & BREWSTER, Appellants, *vs.* PRATT & BUNKER Respondents.

A judgment in a former suit for costs only, on the ground that the complaint contained no cause of action, and in which the merits were not litigated, constitutes no bar to a second suit for the same cause of action.

Nor can such judgment be urged in abatement of the second suit after pleading to the merits. The proper way to take advantage of it in the second action, is to move for a stay of proceedings until the first judgment is paid.

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APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

This cause was submitted for trial, to the Court, without the intervention of a jury, and the following is the decision rendered:

"This cause came on to be tried, and a jury trial being duly waived, the same was submitted to the Court for trial and determination.

"And now having considered the proofs and allegations of the parties, I find the following facts, to wit: That on the 12th day of July, 1858, one John Johnston commenced the action set forth in the complaint to recover the possession of the property therein specified. That said property was taken, in and by virtue of said suit, out of the possession of these Plaintiffs, and delivered to said John Johnston; that said Defendants in this action, Pratt & Bunker, executed the undertaking set forth in the complaint herein at the commencement of the action aforesaid; that such proceedings were had in said action, that on the 31st day of December, A. D. 1858, final judgment was rendered therein for the return of the said property to the said Plaintiffs, and for costs in the sum of $26 50 against the said John Johnston; that immediately after the rendition of said judgment the said Plaintiff made due and proper demand of the said John Johnston of a return to them of said property, and served upon him a copy of said judgment, which said return said Johnston refused to make and still so refuses.

"That afterwards, and before the commencement of this action the said Plaintiffs caused an execution to issue in due form in said action to the Sheriff of the proper county, commanding him to take and deliver the property to the Plaintiffs, which execution was duly served upon said Johnston, February 7, 1861, and was returned by Sheriff wholly unsatisfied, as stated in said complaint; that the value of said property was $250 00.

"I further find that on the 11th day of May, 1859, and prior to the commencement of this action, the said Plaintiffs commenced an action in the County of Nicollet and State of

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Minnesota, against these Defendants, upon the same undertaking set forth in the complaint herein, which said action was between the same parties upon the same subject matter, and in all respects identical with this action; that such proceedings were had in said action, that on the 14th day of December, A. D. 1859, a judgment was duly rendered in favor of said Defendants and against said Plaintiffs for the sum of $26 45, costs of said suit as set forth in the answer of Defendants herein; that said judgment still remains in full force, unreversed, unsatisfied and unpaid; that judgment was rendered for costs only, and not on the merits involved in said action; that said judgment was rendered on a motion for judgment on the pleadings by said Defendants, and without the introduction of any testimony or the determination of any issue, save only that said Plaintiffs' complaint did not contain a cause of action.

"As conclusion of law, I find that said Defendants are entitled to a dismissal of this action. Wherefore, it is adjudged that said action be, and the same is hereby dismissed."

Whereupon Counsel for Plaintiffs excepted to the conclusion of law as found by the Court upon the facts in the case; and moved that the order for dismissal be set aside, and that judgment be ordered and rendered for the Plaintiffs for the value of the property as found by the Court, and costs of suit.

Points and Authorities for Appellants.

We think judgment should have been ordered for the Plaintiffs upon the facts found by the Court. The former judgment is pleaded in bar, but unless it was rendered upon the *merits* of the action, it furnishes no bar to the new suit for the same cause. A judgment upon demurrer, nonsuit, discontinuance or dismissal, or upon any other technical grounds of the pleadings, furnishes no bar to another action for the same cause.

Where judgment has been given for the Defendant, because of the insufficiency of the Plaintiff's declaration, it is no bar

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to another suit for the same cause. *Kendal vs. Talbot*, 1 *A. K. Marsh, Ky.*, 321; *Hamel vs. Lawrence*, *Ib.* 330; *Stevens vs. Dunbar*, 1 *Blackford*, 56; *Bridge vs. Sumner*, 1 *Pickering*, 371; *Morgan vs. Bliss*, 2 *Mass.*, 111; *Sampson vs. Kedgewin*, 1 *Mod.*, 307; *Hughes vs. Blake*, 1 *Mason Rep.* 515, 519.

The cases are very numerous and uniform that a judgment, in order to be a bar to a subsequent suit between the same parties for the same cause, must have been rendered *upon the merits of the action.* 10 *Sm. & Mar.*, 552; 8 *Pick.*, 113; 13 *Sm. & Mar.*, 584; 1 *Pick.*, 371; 23 *Miss.*, 81; 5 *Greenl.*, 185; 4 *John.*, 222; 2 *Phils'. Evidence*, *Cowen & Hills & Edwards' Notes*, *page* 32 *and Note* 267.

Parol evidence, if necessary, is admissible to show that the merits were not involved in the decision upon a former trial, or that the cause of action was not really involved in the former suit. *Parker vs. Thompson*, 3 *Pick.*, 429; *Wood vs. Jackson*, 8 *Wend.*, 9; *Burt. vs. Sterburg*, 4 *Cow.*, 559; 3 *Cow.*, 120; 16 *Johnson*, 136; 9 *Serg. & Rawle*, 424; 2 *Black*, 178; 7 *Cranch*, 565; 3 *Barn., & Cress.*, 239.

I understand from the Counsel of the Respondents that in case his plea of former recovery is not good in bar of the action, he will insist that it shall have the effect of a plea in abatement, upon the ground that the present action cannot be prosecuted until the costs of the former action be paid. This position is not tenable. He has pleaded the former judgment in bar, and it can only have the effect of a plea in bar.

Furthermore, the only means of taking advantage of the non-payment of the costs in the former suit, as affecting the present action, is to move to stay proceedings in this action until the costs in the former action are paid, which has never been done, and it is now too late to make such motion. (*Kentish vs. Tatham*, 6 *Hill*, 372.) And furthermore the answer having set up several other matters in defence besides the former recovery, precludes the Defendants from the benefit of a plea of abatement even if properly set forth as such in the answer. A plea in abatement must be taken in the first instance, and before a general answer upon the merits. An objection in the nature of a plea in abatement, when taken

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in the first instance by answer, is waived by an answer upon the merits, nor can such an objection by the Defendant be inserted in a general answer in bar of the action. *Gordon vs. Clark*, 6 *How. Pr. R.*, 449; *King vs. Vanderbilt*, 7 *How. Pr. R.*, 385; *Monteith vs. Cash*, 1 *Smith's Com. Pl. R.*, 412; *Andrews vs. Thorp*, 1 *Smith's Com. Pl. R.*, 615.

Again, where a cause of action has not been disposed of on its merits, and a subsequent action is brought upon the same matters, the proceedings in the subsequent action will not be even stayed until the payment of costs in the former suit. 19 *John.*, 196.

Points and Authorities for Respondents.

1. It would seem reasonable, *on principle*, that a judgment unsatisfied against a party should be a bar to another suit for the same subject matter. This reasonable principle is strengthened in Minnesota by the act of the Legislature. *Pub. Stat.*, *p.* 544, *sec.* 94.

2. We are to treat the case then as if a judgment had been rendered upon the merits. Otherwise a party would be allowed to take advantage of his own wrong, or at least to take advantage of his own neglect and to have the right of a second suit where he had no merits in the first suit. This the law will not countenance. This case is one under the rules and restrictions of the code, and is not governed by the rules of the common law, except so far as the common law furnishes just and proper analogies where the statute has no application. But, at common law, it would not lie.

3. The cases cited from the States of Kentucky and Indiana, under the system of common law pleadings, can hardly furnish proper analogies for the present case, under a practice that may be and no doubt is wholly different. The Indiana Statute, *Rev. Stat.* 1852, *Vol.* 2, *p.* 48, *sec.* 98, is almost, if not precisely, the same as the section of our statute quoted above; and allows one year for relief against "*inadvertence, surprise* or *excusable neglect*," and no more.

And as we have no evidence before us that the cases referred to from *Blackford's Reps.* were made since the revision of

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the Indiana Statute, we cannot conclude that those citations are pertinent.

Our Statute, *R. S. secs.* 1 *and* 2, *Chap.* 81, speaks of all final judgments, and provides how they may be brought into the Supreme Court. This was a *final* judgment and is not brought into this Court in any of the modes pointed out by the statute, but is an evasion of the statute by bringing a new suit after the time limited has expired; which if allowable would make the law entirely nugatory. If such a cause can be sustained, then the statute is simply a dead letter and there would be *no finality* to what the statute has called a *final judgment.* Even the *extraordinary powers* of a Court of Equity could not, in such a case, grant relief; "Because," says Story, "if a matter has been already investigated in a Court of Justice of competent jurisdiction, according to the common and ordinary rules of investigation, a Court of Equity cannot and ought not to take upon itself to enter into the merits of the case. It is bound to presume that all things have been rightfully done; and the maxim applies, *Expedit reipublica, ut sit finis litium.*" (*Story's Eq. Pl.*, § 780, *a*, 782, and cases cited under § 780, *a.*) Where equity would not relieve, it would be allowing too much in a purely legal matter to permit a second trial in the same case in a different district, without taking the proper steps to vacate, set aside or reverse the former judgment. The cases cited from 1 *Blackford*, 56, would be equivalent to a nonsuit. This might or might not prevent the party from suing again on the same demand in a reasonable time, depending upon the particular case; yet this is doubted. But this is not a case of nonsuit. And against this authority we refer the Court to 1 *Greenleaf Ev.*, 531; 3 *Cowen & Hill's notes to Phillips on Ev.*, 838; *Henderson vs. Reeves*, 6 *Blackford*, 101; 20 *Ohio R.*, *Reynolds vs. Stansbury & Burch*, 344; 7 *Cranch*, 565.

The cases in which former suits do not operate to defeat the second suit are only such as the following: *a nonsuit, a dismissal*, or a judgment against the Plaintiff on a plea in abatement, a special demurrer for form and the like. 10 *Johns. R.* 363; 1 *Phil. Ev.*, 231; *Cowen & Hill's notes*, 578, 585; 15 *Wend.*, 193.

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Our case is not the case of a nonsuit. It is rather a judgment by default on the pleadings and is final unless opened up, appealed from, or corrected in error. 1 *Phil. Ev.*, 320, 358, *and Notes by Cowen & Hill* there referred to. See especially *Note* 558, *pp.* 804, 810.

4. Judgments cannot be impeached except for certain reasons and in a certain way. If for fraud or want of jurisdiction or mistake, they must be impeached by a direct attack and not collaterally, as is sought to be done in this case.

Even in these cases foreign judgments are to be distinguished from domestic judgments; and cases where they may be attacked are confined to third parties. *Silverlake Bank vs. Harding*, 5 *Hammond*, 547-8; 11 *Mass. Reps.*, 266.

In Louisiana under the code a different rule prevails. *Cowen & Hill's Notes, Phillip's Ev., Vol.* 4, (*Part.* II.) *p.* 79.

Smith & Gilman, Counsel for Appellants.

Cox & Bryant, Counsel for Respondents.

By the Court—Atwater, J.—The Plaintiffs, Gerrish & Brewster, brought their action on a replevin bond, against the Defendants, which had been executed by them in favor of the Plaintiffs. The Defendants among other things, plead a former judgment in favor of the Defendants, between the same parties and for the same cause of action, in the District Court in and for Nicollet County. The Plaintiffs replied, alleging that in said action the merits were not litigated, but that the said case was disposed of, upon the ground that the complaint did not state facts sufficient in connection with said bond, to constitute a cause of action.

This issue was found in favor of the Plaintiffs, by the Judge who tried the cause, (a jury having been waived,) but judgment was rendered thereon in favor of the Defendants. The Plaintiffs appeal to this Court. The only question here presented is, whether the above plea, being found true, constitutes a good defence.

That a judgment in a former suit between the same parties, and upon the same matters, constitutes a good plea in bar is

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too well settled to need argument or the citation of authorities. The Plaintiffs here contend, that the matters in issue in the present suit were not litigated in the former suit. With reference to that former suit the Court below has found that the judgment therein "was rendered for costs only, and not on the merits involved in said action; that said judgment was rendered on a motion for judgment on the pleadings by said Defendants, and without the introduction of any testimony or the determination of any issue, save only that said Plaintiffs' complaint did not contain a cause of action." What the defect in the pleadings was, does not specifically appear. If the Court below adjudicated upon the bond itself, and held it void for any reason, that would perhaps form a bar to this action, while the judgment remained unreversed. But the finding of the Court below precludes the supposition that such was the case, as it is expressly stated that the judgment *was not rendered on the merits involved in said action.* The defect, therefore, it is reasonable to presume, must have consisted in the insufficiency or informality in the statement of the cause of action. If the Plaintiffs in the present suit have stated a good cause of action, it is difficult to see how it can be barred by the proceedings in the former suit, for it appears from the finding of the Court, that not only has it not been litigated, but has not even been presented in Court, as the former judgment was for costs only, on the ground that the complaint did not state *any* cause of action. It is true that the suit was between the same parties, and upon the same subject matter, but the matter has not been litigated, nor even presented in a shape that it could be litigated, as the Plaintiffs failed to state a legal claim against the Defendants. Where the cause has gone off upon some defect, which precluded an inquiry into the merits, the judgment is usually no bar to a second action. 4 *Cow. & Hill's Notes to Phil. Ev., p.* 9, *note* 12. In 2 *W. Black.*, 3 *Wils.*, 304, the principle is conceded, that if the real merits of the second action have not been decided in the first, the prior judgment is no bar. I do not think the Plaintiffs here are in any worse position in regard to this former suit, than they would have been had the Defendants demurred to the declaration; and in 1 *Chit. Plead.*, 227, it is

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stated that "if the Plaintiff mistake his cause of action, and the Defendant demur, the Plaintiff is certainly not precluded from commencing a fresh action, and may reply to a plea in bar of the judgment on demurrer, that the same was not obtained on the merits," and see authorities there cited, and *Knox vs. Waldborough*, 5 *Greenl. Rep.*, 185, in which it is held that "a decision of the Court in favor of the Defendant, upon an agreed statement of fact, and a nonsuit of the Plaintiff entered, and judgment thereon for the Defendant for his costs, pursuant to such agreement, constitute no bar to a subsequent action for the same cause." And in the text of *Chitty* above cited it is stated that "if the Plaintiff demur to the plea in bar upon the merits, and such plea be sufficient, in that case also no second action can be commenced; but if the plea were not sufficient, and the judgment against the Plaintiff was on the defect in his declaration, the former judgment against him will be no bar." And in 1 *Greenl. on Ev.*, § 529–30, it is stated that "it is only where the point in issue has been *determined*, that the judgment is a bar. If the suit is discontinued, or the Plaintiff becomes nonsuit, or *for any other cause* there has been no judgment of the Court upon the matter in issue, the proceedings are not conclusive. So also, in order to constitute the former judgment a complete bar, it must appear to have been a *decision upon the merits*; but if the trial went off on a technical defect, &c., the judgment will be no bar to a future action." And analogous to the above is the practice in criminal cases, in which if the former acquittal was for want of substance in setting forth the offence, it is no bar to a second prosecution. 3 *Green. Evidence*, § 35. And see *Hughes vs. Blake*, 1 *Mason*, 515; *Snider vs. Croy*, 2 *John.*, 227; *Seddon vs. Tutop*, 6 *Durn. & East.*, 607; 4 *Durn. & East.*, 147; *Morgan vs. Bliss.*, 2 *Mass.*, 111; *Bridge vs. Sumner*, 1 *Pick.*, 371; 4 *Gill. & Johns.*, 345; *Stevens vs. Dunbar*, 1 *Black.*, 56; *Kendal vs. Talbot*, 1 *A. K. Marsh*, 321; *Hamel vs. Laurence*, *Ib.*, 330; 1 *Mod.*, 307; *Phillips vs. Berrick*, 16 *John.*, 137; *Wheeler vs. Van Houten*, 12 *John.* 311; 8 *Pick.*, 113.

We are cited by Respondents' counsel to *Sec.* 94, *Comp. Stat.*, *p.* 544, but that has no application to the present case. The Appellants seek no relief from the former judgment, nor

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indeed does it appear that they are entitled to any, or could have obtained any had they applied within a year from its rendition. If, as the Court has found, no cause of action was set forth in the complaint, the judgment for the Defendants therein was correct. But because the statute requires a party to move within one year in order to be relieved from a judgment, no valid argument can be drawn therefrom, that a party is wholly precluded from commencing a new action, nor that it must necessarily be commenced within one year from the time of rendition of judgment on the former action. The Code has introduced no new rule upon this point, since the statutes of many, if not most of the States, have long contained similar provisions to that above referred to.

Nor do the authorities cited sustain the position assumed by Respondents' counsel. In *Story's Eq. Pl.*, § 780–2, it is stated, that "if the judgment of a Court of ordinary jurisdiction has finally decided the rights of the parties, that judgment may in general be pleaded in bar of a bill in equity." And, "if a matter has been already investigated in a Court of Justice of competent jurisdiction, according to the common and ordinary rules of investigation, a Court of Equity cannot, and ought not, to take upon itself to enter anew into the merits of the case." The author here only says that where a Court has "*finally decided the rights of parties*," such fact will constitute a good plea in bar to a bill in equity. And that "if a matter has been already investigated, that a Court of Equity cannot and ought not to take upon itself to *enter anew into the merits of the case*." The doctrine here stated is undoubtedly well settled law, but not applicable to the case at bar, since it is manifest that no Court has finally decided the rights of these parties, nor is the Court asked to enter *anew* upon the merits, since the merits were not considered by the Court in the former action. The case in 7 *Cranch*, 565, only decides that a record of former recovery, supported by parol proof that the former suit was for the same cause of action, is admissible under the general issue. In *Hess vs. Beekman*, 11 *John*, 457, the Defendant pleaded a former suit before the same justice, between the same parties for the same cause of action, in which the merits of the

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Plaintiffs had been fairly entered into, &c. The Court say, "in this case there was no jury on the former trial; but the merits were fairly entered into and investigated and finally submitted to the justice," and the Plaintiff was held concluded by the former trial. No further statement is needed to show the difference between that case and the present. And the cases cited by the Court in that case (5 *John.*, 346, 2 *John*, 181, *Ib.*, 191,) are equally inapplicable. In both the last named cases, the Court held the plea of former recovery good, on the ground that the *same matter* had been *litigated.* And in 5 *John*, 346, the only point decided was, that a Plaintiff in a Justice's Court may withdraw and be nonsuited, before the jury give their verdict. The cases in 15 *John.*, 129, 432, and 15 *Wend.*, 557, and 5 *Hill.*, 408, are not applicable to the case at bar. And in short, we find no case where it has been decided, that a judgment in a former suit, in which the merits have never been submitted to a Court or jury, but which has gone off upon a defect in the statement of the cause of action in the declaration, constitutes a bar to a second action.

The judgment below is reversed and a new trial granted.

Flandrau, J.—The former suit and judgment was no bar to the present action, as my brother Atwater has clearly shown. But it appears from the Appellants' brief that the Defendants insisted in the Court below that the plea, if not good as a bar, could be urged in abatement so long as the former judgment was unpaid. Even if this unpaid judgment for costs could have been pleaded in abatement under any circumstances, the Defendants have waived such plea in this case by pleading to the merits. *Gordon vs. Clark*, 6 *How. Pr. R.*, 449; *Graham's Prac.*, 2*d Ed.*, 224. The proper way to have taken advantage of the former judgment was to move for a stay of proceedings in this action until the same was paid. *Kentish vs. Totham*, 6 *Hill.*, 372; *Perkins vs. Hinman*, 19 *John.*, 237; 1 *Cow.*, 138; 3 *Cow.*, 22; *Id.*, 381.

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JOHN G. STEVENS, Appellant, *vs.* E. A. C. HATCH, *et als*, Respondents.

Where a party executes and acknowledges a deed, and afterwards, either by acts or words, expresses his will, that the same is for the use of the grantee, especially where the assent of the grantee appears to the transaction, it shall be sufficient to convey the estate. And this, even though the deed remains in the hands of the grantor.

No particular form is necessary in order to constitute a good delivery of a deed. This may consist in an act without words, or in words without any act. The main thing which the law requires, is that the mind of the parties should be manifest, the one to deliver, the other to accept the instrument.

(The facts are stated in the opinion of the Court.)

Points and Authorities of Appellant.

I.—The controversy grows out of the 20-acre tract claimed by the Respondent, C. C. B. Hatch, who insists that she holds the same discharged from the mortgage of the Appellant. The presumption raised by the deeds themselves is against the Respondent's title, and the burden of proof is on them to establish their title, and overcome this presumption.

II.—The Respondents have no equities as innocent purchasers for value, and do not claim as such. They got title through Newton, in March, 1858. An examination of the records at that time disclosed, *prima facie*, a perfect lien on the twenty acres by our mortgage.

There was the first deed from Becker to Newton, recorded November, 1855. Then the second deed, correcting the first, dated and acknowledged May 10, 1856, and recorded May 13, 1857, at 8 o'clock A.M. Then the mortgage from Newton to the Appellant, dated and acknowledged May 9, 1857, and recorded May 13, 1857, at eleven o'clock, A.M. Presumptively, the second deed, correcting the first, was delivered at its date, May 10, 1856, a year and a day before the mortgage was executed. No recording was necessary to perfect these conveyances; but the deed was actually recorded three hours before the mortgage.

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At best, then, the Respondents stand in Newton's shoes; for if they bought, relying on the records for title, those records, on their face, showed that no title could pass, but subject to our mortgage. If they bought with knowledge of the facts stated in Becker's testimony, intending to hold the land discharged from the mortgage, they became purchasers in anything but good faith. The fair presumption is, that they bought relying on the covenants of warranty in their deed, under which Newton will have to save them harmless from the prior lien.

III.—The second deed, from Becker to Newton, correcting the first, was duly made, executed and *delivered*, and thereupon vested the fee in Newton; and the depositing the deed in the safe of Hollinshead & Becker, as explained by the circumstances, and by the correspondence between Becker & Newton, fixes the *time* of the delivery.

The deed became, by the consent of both parties, perfect and effectual in every way to pass the estate. The exact time when the estate passed is not very material, but it cannot be later than the date of Newton's letter, where he assents to the manner in which Becker had executed and delivered the deed, August 29, 1856.

Look at the facts, and see what it was the parties sought to accomplish. Newton, then living in Superior, had discovered the error in his deed. He writes to Becker, telling him to correct the error and perfect his title. Becker instantly proceeds to comply with the request, he residing in St. Paul. He makes the deed, signs, seals and acknowledges it, and makes the only practicable delivery, at least such a one as he believes Mr. Newton will approve. Newton is not here to take the deed himself, and he does not care to entrust it to the chances of a mail through the wilderness to Superior. He does not record it, because the record is not necessary to make the conveyance valid, and Mr. Newton has not directed him to record it. He puts it into the safe of Hollinshead & Becker, so that Mr. Newton can have the benefit of the deed "to guard against accidents to him," in the language of his letter, and thereupon writes to Newton the manner in which he had complied with his request, and executed and delivered

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the deed. Mr. Newton, in reply, assents thereto, and is satisfied with the manner in which Becker had thought proper to deliver the deed. The deed is thus made, executed and delivered by the consent of both parties, and, in accordance with their mutual consent, deposited for safe keeping in the safe of the law firm of Hollinshead & Becker, neither party contemplating that any other act or thing whatever was necessary; and can it be that the title still remains in Becker? It is conceded the record of a deed is in no way necessary to pass the title, or of any use whatever, except to protect the grantee from the fraud or mistake of the grantor. Suppose, then, that Becker, instead of putting the deed in the safe, had put it on record, and then written to Newton, who assented thereto. The authorities all concur that such would have been an effectual delivery. Now, as the record of the deed amounts to nothing, as regards the passing of the estate between the parties, how is the delivery any less effectual when everything is done but the recording? Becker has done everything necessary to make a perfect conveyance, except a single act, wholly immaterial as it affects the grant, and still the grant is not perfect until the immaterial act is consummated. Such is not the logic of the law, though it is the logic of the Respondents' case. Again, nothing less than an actual delivery of the deed is consistent with the language of the parties.

The plain intent of the language of Becker's letter, that he had put the deed in the safe, "to guard against accidents to him," is this: In case of Becker's death, without any further act whatever, the land will not go to his heirs, nor will Newton have to look to them for a correction of the deed; the deed correcting the title will be found in the safe where it has been deposited for safe keeping. Had Becker died while the deed was in the safe, under the circumstances, and before Newton came down and recorded the deed, would the estate have gone to Becker's heir, against the express language and understanding of the parties? Or would a judgment against Becker have intercepted Newton's title? On the theory of the Respondents' case, both these queries are to be answered in the affirmative. We think to answer them does violence

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to the plain intent and understanding of both parties, to common sense, and to the law of the case.

There is nothing mysterious in the delivery of a deed, and it can be accomplished in ways as numerous and varied as are the transactions of men. *Coke on Littleton*, 36 "*a*;" *see Shep.*, *Touch.*, 57. In the first case, the delivery is without words, by act only; in the second case the delivery is by words without deeds. Can it make any difference that the words are spoken by letter, and is not the presumption of delivery stronger where the transaction is by letter, and the grantee absent, so that *words only* can be used to make good the delivery. 2 *Hilliard*, 295; *Doe, dem. Garnous vs. Knight*, 5 *Barnwell & Cress.*, 671; *Barlow vs. Heneage, Pre. Cha.*, 211; *Clavering vs. Clavering* 2 *Vern.*, 473; *Naldred vs. Gilham*, 1 *P'r. Williams*, 577; *Boughton vs. Boughton*, 1 *Atkins*, 625; *Shelton's case* (*Cro. Eliz.*, 7), cited in the case of *Souverbye vs. Arden*, 1 *John. Ch.* 240; *Sohrugham vs. Wood*, 15 *Wend.*, 545; *Folley vs. Vantuyl*, 4 *Halst.*, *Rep.* 153; *Farrer vs. Bridges*, 5 *Humphreys*, (*Tenn.*) 412.

IV.—It is not pretended that any conditions were to be performed before the delivery could be complete, and the deed was no escrow; for,

1. It was delivered to no third party.

2. It was delivered with no conditions whatever to be performed.

3. No conditions or things whatever were ever performed, and still it is conceded that Newton afterwards got the title.

V.—Conceding, for the purpose of the argument, that the deed was not delivered at the time when we contend it was delivered, still the presumption is fair on the case as it stands, that Newton actually received the deed into his possession before he made our mortgage, the 9th of May, 1857. The whole burden of proof is on the defence.

VI.—The after acquired title of Newton would enure to the benefit of the Appellant, his mortgagor.

The mortgage had no express covenant, but it purported to grant and convey the premises to the Appellant, and a man

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cannot claim in opposition to his own deed. "A grantor (and, of course, those claiming under him,) in a deed is estopped to deny his grant and his title to the estate conveyed." *Jackson vs. Murray*, 12 *John.*, 201; *Barber vs. Harris*, 15 *Wend.*, 615; *Brown vs. McCormick*, 6 *Watts*, 60; *McWilliams vs. Nesly*, 2 *S. & R.*, 507; *Somes vs. Skinner*, 3 *Pick.* 52; *White vs. Patten*, 24 *Pick.*, 324.

The case of *Van Rensselaer vs. Kerney*, 11 *How.*, 297, was carefully considered, and will fully support the estoppel in this case. See, also, 2 *Cowper*, (*Com. Law*,) 597.

Points and Authorities of Respondents.

The right of the Plaintiff to subject to the payment of his debt the portion of the mortgaged premises claimed by Hatch, depends upon the question, whether Becker's second deed to Newton (which is Newton's and his assign's only title to it,) was delivered prior to Hatch's purchase.

There can be no dispute about the legal proposition that a deed takes effect only from the date of its delivery. It is well settled that until delivered it has no operation—it is no deed. But questions often arise, and do in this case, as to what constitutes or amounts to a delivery.

In the case of *Maynard vs. Maynard el al.*, 10 *Mass.*, 455, the deed was left with the scrivener, with directions to get it recorded, which was done. *Held*, no delivery. In the case now before this Court, there was no recording, nor any act which passed the deed from Becker's exclusive possession and control—it was not left with a third party. His informing Newton that he had made it out, did not give the latter any control of it, or prevent Becker from destroying it the next moment, or refusing to give it up to Newton.

In the case of *Hatch vs. Haskins*, 17 *Maine*, (5 *Shepley*,) 391, it was held, that if a deed be found in the hands of the grantor, the presumption arises that no delivery had been made.

In the case of *Jones vs. Jones*, 6 *Conn.*, 111, Hosmer, C. J., says: "As the deeds were never delivered, but were retained by the grantor in his own possession, the putting them into

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the custody of the Town Clerk for record, must be laid out of the question. It was no delivery of them."

That case is not so strong as the one before this Court. Because, in that there was no claim, as in this, by another purchaser ; and in this case not any third person, not even the recording officer, was invested with any custody whatever, however slight or qualified ; but Becker retained the whole exclusive, absolute, unqualified possession, control and custody. See also, *Hale & Wife vs. Hills*, 8 *Conn.*, 39, and *Stillwell vs. Hubbard*, 20 *Wendell*, 44.

In *Moore vs. Collins*, 4 *Dev.*, 384, (cited in note to *Maynard vs. Maynard*, 10 *Mass.*, 458,) the grantor said to the attesting witness, " I acknowledge that to be my act and deed." Yet held to be no delivery.

The attention of the Court is called to all the cases cited in the note to *Maynard vs. Maynard*, from which we think it will clearly appear, that while there might be doubt, if the question were to be decided upon the authority of the English cases, the American cases remove that doubt, for they are all on our side ; and certainly in this country, where the American authorities are uniform, they are to be followed, rather than opposing English authorities.

It is true in this case, that it was Becker's intention to have included this land in his first deed to Newton, but equally true he did not do it, and that Hatch had no knowledge or even constructive notice of such intention. Therefore no equity arises against him by reason of such intention.

It is also true that Becker made the second deed to cover the former mistake, and it was commendable in him to do so ; and it is true that it was his intention to make a good and sufficient actual delivery of it to Newton, and then perfect the title, so soon as he might have an opportunity to do so, and that he duly informed Mr. Newton of this state of his mind and will. But it is equally true that of all this Hatch was ignorant, and had no notice, constructive or otherwise, and became a *bona fide* purchaser, without notice of any equity against him, before Becker had this opportunity to carry out his well-meant intentions.

Information to Hatch of what he intended to do, might

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have answered in equity the same purpose as doing it, but information to Newton alone amounted to nothing. There is often a broad distinction in both law and fact between doing a thing, and informing a person, by letter, of your readiness, willingness and intention to do it at some future time, as opportunity may afford.

We make these observations because we suppose the whole case of the Plaintiff rests upon Becker's letter, and that his simple act of making out a deed, if he had gone no further in the matter, would not be claimed as a delivery, or to affect any rights of property.

Now, all he did in addition, was to simply inform one person, (Newton) of this act. It was not any new or distinct act, but an announcement of the performance of the act of making the deed, and did not add anything to the legal effect of that act; certainly not as against Hatch, who had no notice of it.

The reason and analogies of the law sustain our position. In all other matters, when the question of legal right turns upon the fact of a delivery, it would be held absurd to claim that a man had made a delivery of a thing if he had never, for one second, parted with the exclusive control over it, and could destroy it at his pleasure, or refuse to part with its possession. We do not say that a promissory note, a sum of money, a load of grain, or a cargo of lumber has been delivered to one who has never seen it in person or by agent, and can neither see it, possess it, or exercise any act of ownership, control, or custody over it without some further or new act of some person, who, whatever may have been his expressed intentions, may, nevertheless, refuse to allow such custody, and who may legally, and without trespass, beat off the claimant, and even destroy the thing itself.

To constitute a delivery of a deed, the grantor must part with the control, and the grantee must come into the control of it.

In the case of a deed delivered in escrow, the grantor parts with the control, but it does not take effect until it comes into the control of the grantee.

It takes two parties to make a good delivery. There must

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be an acceptance, and there is no evidence of any by Newton. As to whether a deed without warranty conveys an after acquired title, see *Rawle on Covenants* for title, 441, &c., and the cases there cited.

Geo. L. & E. A. Otis, Counsel for Appellants.

Masterson & Simons, Counsel for Respondents.

By the Court—Atwater, J.—This was an action brought by the Appellant, Stevens, to foreclose a mortgage made and executed by Newton, one of the Defendants, May 9th, 1857. Judgment was taken by default, against all the Defendants except Hatch and wife, who answered, alleging that C. C. B. Hatch was seized in fee simple, and in possession of twenty acres of the premises mortgaged, and that she acquired title thereto through a deed of conveyance made by Defendant Newton to said C. C. B. Hatch, made and delivered March 1, 1858, recorded May 10, 1858, in Ramsey County, and that at the time of the execution of the mortgage set forth in the complaint, the said Newton had not any title to the premises claimed by Defendants, and that the title of Newton was acquired subsequent to the execution of the mortgage to the Plaintiff.

These allegations were denied by the reply.

A jury trial was waived and the cause was tried by the Court. The whole evidence submitted in connection with the pleadings, was the deposition of Geo. L. Becker, Esq., on the part of the Defendants, which was read without objection and by consent. The facts may be stated as briefly as in any other manner, by quoting the material parts of this deposition, which are as follows:

"On the 23d of July, 1856, Newton wrote to me that a deed I had made to him the October previous, contained an erroneous description of the land intended to be conveyed. I had sold him a strip of land 160 rods by 20 rods, off the north side of the north half of the southeast quarter of Section 10, T. 28, R. 23. In the deed, which was dated October 23, 1856, I had described the land as a part of the

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S. W. quarter of said section 10, and on July 23, 1856, he wrote to me calling my attention to the description, and asking me to correct it. I replied to him under date of July 31, 1856, by stating that I had made out a deed for a strip of land from north side of north half of southeast quarter, &c., a copy of which letter is hereto annexed as Exhibit A, and received as original. Under date of August 29, 1856, Mr. Newton replied, that it was all right as I wished to do. The reply is Exhibit B, received by consent as the original. The deed lay in the safe of Hollinshead & Becker until I saw Mr. Newton in the spring following. He informed me then that he had made a loan on the property to Mr. John G. Stevens, and desired me to make to Mr. Stevens a statement of the condition of the property, which I did, under date of May 12, 1857, hereto annexed, marked as Exhibit C. I do not know whether I delivered the deed to Newton for record, or recorded it myself. I think the letter to Stevens was written the 12th, as dated, and retained until after the mortgage was recorded."

The material portions of Exhibits A and B above referred to are as follows, the first being the letter of Mr. Becker to Mr. Newton of July 31, 1856:

"* * * I have made out a deed to you rectifying the mistake in my former one, for land on the reserve, as I before wrote you. I need no deed from you. This deed from myself and wife to you, is in our safe to guard against accidents to me, but I would rather not record it until I see you again in St. Paul, and we can both see for ourselves that all is right. However I will do as you desire in the matter."

The next is the letter of Mr. Newton in reply to the foregoing, dated Superior, August 29, 1856, as follows:

"Yours of July 31st received, in relation to your deed to myself of Reserve lands. It is all right as you wish to do." (The balance of the letter relating to other matters.)

Then follows a letter from Mr. Becker to the Plaintiff, giving a statement of the title to the mortgaged premises, (including the tract in dispute,) which the writer concludes is satisfactory. This letter is dated May 12, 1857, but retained, as Mr. Becker states in his testimony, until the mortgage was

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recorded. Then follows the deed from Becker and wife to Newton, dated October 23, 1855, filed for record November 25, 1855. Also the deed of Becker and wife dated May 10, 1856, to Newton, recorded May 13, 1857, at 8 o'clock A. M., and which states that the same was given to correct an error in the deed of October 23d, 1855. The mortgage from Newton to Stevens was recorded May 13th, 1857, at eleven o'clock A. M.

As conclusions of fact, the Court found, "that at the time of the execution and delivery of the said mortgage as aforesaid, the said last named deed from the said Becker and wife to the said Newton, had not been delivered to the said Newton, but had remained, and was in the safe aforesaid, and in the custody and control of the said Becker, that said deed was first delivered on the 13th day of May, 1857, when the same was filed for record as aforesaid." And as conclusions of law, *inter alia*, the Court held "that said Newton had no title to the said twenty acres at the time of the execution and delivery of the said mortgage to the Plaintiff; that the acquisition of the title to said twenty acres after the said mortgage was executed by virtue of the said second deed from the said Becker and wife to said Newton, did not enure to the benefit of the said Plaintiff as against the Defendants Hatch and wife, and that the said mortgage is not a valid and subsisting lien upon the said twenty acres," &c. And the said twenty acres were adjudged to be the property of Charlotte C. B. Hatch. From which judgment the Plaintiff appeals to this Court.

Before passing to an examination of the main question presented by the facts above disclosed, it may be proper to remark, that the Respondents have no equities as innocent purchasers for a valuable consideration as against the Appellant. Their deed from Newton was made and delivered March 1, 1858. An examination of the records would have disclosed the fact, that Newton acquired this property May 10, 1856, as in the absence of any evidence to the contrary, that is presumptively the time of the delivery of the deed. And the same deed disclosed the fact, that he was in equity the owner of the premises, from October 23, 1855. The deed

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from Becker to Newton was in fact recorded, before the mortgage from Newton to Stevens. Here were circumstances amply sufficient to put Respondents on inquiry, and if they purchased with full knowledge of all the facts disclosed upon the trial, their claim must be regarded as solely of a legal nature, unsupported by equities.

The important question presented by the case is, whether there was a delivery of the deed from Becker to Newton, of May 10, 1856, before the execution and delivery of the mortgage from Newton to the Plaintiff. From a careful examination of the facts proved, and the authorities applicable, I think there was a good delivery of this deed, previous to the execution and delivery of the mortgage. It will be observed that this was not an original sale of the premises, but a correction of a previous deed. Newton was already the equitable owner of the premises, and the sole object of the deed was to correct an error, and vest the legal title in Newton, to which he was rightfully entitled. This fact is not wholly unimportant, in the circumstances, in determining the intent of the parties as to the disposition of the deed. I think there can be no question but that the object of Becker at the time of the execution of this deed, and at the date of his letter to Newton of July 31st, 1856, was to vest in Newton a good title in the premises; and such was the desire of the grantee. This relieves the case of a consideration which sometimes proves an embarrassing feature, in analagous cases, leaving only for determination whether the parties have by their acts given effect to their intent.

The doctrine seems to be settled beyond reasonable doubt, that where a party executes and acknowledges a deed, and afterwards either by acts or words, expresses his will, that the same is for the use of the grantee, especially where the assent of the grantee appears to the transaction, it shall be sufficient to convey the estate, although the deed remains in the hands of the grantor. At the time this second deed was executed, Becker did not pretend to be the rightful owner of the premises, and the facts I think show conclusively that he intended to vest the legal estate in Newton at the date of his letter of July 31st, and actually did all he could to carry out such in-

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tent. The grantor was then in St. Paul, and the grantee in Superior, Wisconsin, and a manual delivery in person was impossible. But he certainly both speaks of, and treats the deed, as belonging to Newton, had placed the same where he deemed it safe against accidents to him, and offers to record it if Newton wishes it done. It is true, he says he would rather not record it until he sees Newton in St. Paul, but that clearly was not with the object or design of controlling the ultimate disposition of the deed, but rather for the benefit of Newton, that he might see it was *all right* before recording. No record was necessary in order to pass title, and both parties evidently thought the legal title was then vested in Newton. The latter assents to the disposition Becker had made of the deed, and if Becker might still be considered as having control of the deed, it would rather be as Newton's agent, than as of his own right. It is impossible even to imagine any valid reason why the grantor should have desired any control of the deed, since there was no condition whatever to be performed by the grantee to entitle him to receive the deed; but upon the facts disclosed, the grantor would have been a wrong doer in withholding the deed after demand. Every presumption therefore must be in favor of giving full effect to the deed, as of the date of its execution, or at least, from the time the grantee assented to it.

In 2 *Hilliard on Real Property*, 282, it is stated that "no particular form is necessary to the delivery of a deed." This may consist in an act without words, or in words without any act. Thus, where the deed lies upon a table and the grantor says to the grantee, "go and take it up, it is sufficient for you," or, "it will serve your turn," or, "take it as my deed," or, where he holds it out and says, "here is your bond, what shall I do with it," though it never comes into the hands of the obligee; this is a good delivery. The same is held in *Shep. Touchstone*, 57. It is true, that in these cases, the grantee is spoken of as being present, but I do not think there is any difference in principle whether the grantor speaks the language to the grantee in person or by letter. The main thing which the law looks at, is whether the grantor indicates his will that the instrument should pass into the

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possession of the grantee, and if that will is manifest, then the conveyance enures as a valid grant, although as above stated, the deed never comes into the hands of the grantee.

In *Doe vs. Knight*, 5 *Barn. & Cress.*, 671, the Court went even further, and held that a mortgage found among the papers of the mortgagor after his death, and in regard to the execution of which the mortgagee knew nothing, took effect even as against the creditors of the deceased. The Court there held that a deed will operate as a deed, though never parted with by the grantor, citing several authorities, upon which the Court remark: "On these authorities it seems to me, that where an instrument is formally executed, and delivered, and there is nothing to qualify the delivery, but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential." The delivery here spoken of, was a delivery to the sister of the grantor, who lived in the same house with him, but who was not informed of the contents of the paper, nor directed to deliver it to the grantee, and afterwards the deed was taken by the grantor. And in fact, it does not appear ever to have been beyond his control, and the delivery to his sister could have had no other effect than as a circumstance indicating perhaps in some degree the mind of the grantor that the same should enure as a grant. There are several other English authorities nearly to the same effect, which it is deemed unnecessary to cite, as the counsel for the Respondent claims, that while there may be doubt upon the English authorities, the American authorities relieve the question of doubt, and establish that in the case at bar there was no delivery. It may be proper therefore to examine some of these authorities, and see how far they sustain the views of the Respondents.

In *Souverbye vs. Arden*, 1 *John. Ch.*, 240, it was held that "if, at the time of executing a deed, there was no delivery, or intention to deliver, these are facts which should be explicitly proved by the grantor." The Chancellor cites with approbation, *Shelton's case*, (*Cro. Eliz.*, 7,) in which the "deed was

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sealed in the presence of the grantee and others, and was read, but not delivered; nor did the grantee take it, but it was left behind in the same place; and yet in the opinion of all the justices, it was a good grant, for the parties came together for that purpose, and performed all that was requisite for perfecting it, except an actual delivery; being left behind, and not countermanded, it was held to be a delivery in law." In this case it is true the parties were present, but no act seems to have been done save to read the deed, that is, to make the grantee acquainted with the contents, and the decision must have been based on the ground that the minds of the parties assented to it as a deed. If this assent be ascertained in any other manner than by the personal presence of the grantor and grantee, I do not see why it should not be equally binding. And in *Souverbye vs. Arden* it is further held, that "a voluntary settlement, fairly made, is always binding upon the grantor, unless there be clear and decisive proof, that he never parted, *nor intended to part* with the possession of the deed; and *even if he retains it*, the weight of authority is decidedly in favor of its validity, unless there be other circumstances beside the mere fact of his retaining it, to show it was not intended to be absolute." If this be true of a mere voluntary deed, where the grantor is under no obligation to convey, it would seem the presumption should be much stronger in favor of the validity of a deed, where the grantor was under both a moral and legal obligation to convey, and the circumstances show in the strongest manner the intent of the parties to make the grant absolute.

In the case of *Hatch vs. Haskins*, 17 *Maine*, 391, which is cited by Respondents' counsel, the point decided so far as it has any bearing on the case at bar, was, that "the possession and production of a deed by the grantee is *prima facie* evidence of its having been delivered; and for like reasons, in the absence of all contradictory testimony, the presumption arises, when found in the possession and produced by the grantor, that it has not been delivered." The only evidence in that case touching the mortgage in question, was that the same had been found signed and acknowledged among the papers of the administrator of the mortgagor, some years (as

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it would appear,) after the death of the latter, there being no evidence aside from this that it was ever intended to give it effect as a mortgage. The case is, therefore, evidently not very closely analogous to the one at bar.

The case of *Maynard vs. Maynard*, 10 *Mass.*, 456, which is also relied upon by the Respondents, although perhaps more nearly analogous to the present than the one last above cited, is still widely different from it. The point decided as stated in the syllabus is, that "where A. signs and seals a deed conveying land to his son, and leaves it with the scrivener, with directions to get it recorded, which was done; and the deed, at the grantor's request, still retained in the scrivener's hands until the death of the son, when the father reclaimed and cancelled it, the son having known nothing of the transaction; it was holden, that the father was still entitled to the land, as against the heirs of his son, the conveyance never having been perfected by a delivery of the deed." The Court in its opinion says, that "the act of registering a deed does not amount to a delivery of it, there not appearing any assent on the part of the son, or even any knowledge that the deed had been executed in his favor." I think it may well be questioned whether such act does not amount *prima facie* to a delivery, as a number of authorities assert such doctrine; but the Court in that case did not base its decision on that fact, or certainly not that alone, as it is further remarked, "but the facts in the case at bar, testified by the person who acted as the scrivener and magistrate, leave no doubt of the intention of the grantor ultimately to pass this land to his son but to *keep the control over it*, until he should be more determined upon the subject." And herein we think the facts in that case show directly the opposite of what is shown by the facts in the case at bar. That was the case of a voluntary conveyance, and not only was the object of the conveyance totally different from that in the present, but the intent of the parties as to the control of the deed, as evidenced by the facts, was likewise different. And even in that case it was not decided whether the record of the deed would not be sufficient to give a title to attaching creditors of the grantee as against the grantor.

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In *Stilwell vs. Hubbard*, 20 *Wen.*, 44, where the grantee was not present at the time of the execution of the deed, no formal delivery having been made to a third person, and the grantor by his declaration showing that he *intended* the deed should operate in the nature of a testamentary disposition not to take effect until his death, the deed was held inoperative for want of delivery. That case does not reach the question here at issue. Bronson, J., in delivering the opinion of the Court, says: "The deed was never delivered to nor accepted by Altie, the grantee, but remained in the possession of the grantor until the time of his death. There were no formal words of delivery and nothing was said at the time the deed was executed *from which it can be inferred* that Hubbard intended it should be a present operative conveyance. *On the contrary, it plainly appears that he intended the deed should not take effect until after his death.*" The Court cite *Doe vs. Knight*, and it may reasonably be inferred, that had the deed fallen within the principle of that case, it would have been sustained.

The case of *Scrugham vs. Wood*, 15 *Wen.*, 545, is more nearly analagous to the one at bar, in which it was held that where a deed of lands is prepared for execution, read, signed by both parties and acknowledged as their deed before an officer authorized to take acknowledgements, it is a complete and valid deed, notwithstanding the witnesses present at its execution unite in testifying that there was no *formal delivery* of it, and the deed, after the death of the grantor, be found in his secretary among his private papers. The Court say, "no one can doubt, from the account of the execution of the deed given by the Commissioner in connection with the previous preparation of it at the instance of Scrugham, that it was the *understanding and intent* of all parties at the time of the execution and acknowledgment, that it was delivered." And the case of *Doe vs. Knight* is here expressly cited with approval.

In *Jones vs. Jones*, 6 *Conn.*, 111, the point actually decided as appears from the syllabus was, that "where a parent in consideration of natural affection, executed deeds of part of his estate to two of his children, to secure a provision for

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them, but retained such deeds in his custody, giving directions to his wife to lodge them, after his death, with the town clerk for record, which was accordingly done; it was held, that this was an agreement, which a Court of Chancery would enforce. In that case it was not claimed or pretended on the part of the Plaintiffs (so far as appears from the report,) that there had ever been a delivery of the deeds, but that "these deeds being intended as a family arrangement, in the nature of a testamentary disposition, a Court of Chancery would give them effect, notwithstanding the grantor retained the custody of them during his life time." And as the reasoning of the Court was almost wholly directed to a discussion of the correctness of this position, the remark, that "the putting them (the deeds,) into the custody of the town clerk for record, must be laid out of the question—it was no delivery of them," is only incidental at most, if not wholly *obiter*. The case is scarcely parallel in any sense with the one at bar, and undertakes to settle or decide no principle save that stated in the syllabus.

The case of *Hale vs. Hills*, 8 *Conn.*, 39, treats solely of the admissibility of certain evidence, where delivery of a deed was one of the questions in issue, and is entirely silent as to what constitutes a good delivery.

The case of *Farrar vs. Bridges*, 5 *Humphrey*, 412, holds that "no formal or ceremonious delivery of a deed of conveyance is necessary, if no condition be annexed and nothing remains to be performed in order to give effect to a deed of conveyance, its signing, sealing and attestation as a valid instrument between the parties will make it complete and effectual, although the instrument may be left in the possession of the bargainor." And in *Harris vs. Sanders*, 2 *Strobh. Eq.*, 370, it is held that "there is no prescribed formula for the delivery of a deed. If it appears from all the facts and circumstances that the gift or contract was complete without any conditions or qualifications annexed, and without anything more remaining to be done, it is a valid delivery and a perfect deed although left in the hands of the donor." In the case at bar, can it be reasonably contended, that any conditions or qualifications were imposed by the grantor in order

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to its taking full and complete effect? Or that, had the grantee been present, it would not actually have been delivered into his hands, instead of being deposited in the safe of Hollinshead & Becker for his use? And where the intent of parties is manifest, I know not why Courts should not give it effect in this case, not less than others relating to contracts. The cases above cited would seem sufficient to show that the American authorities have established no different rule from that adopted in England with reference to the delivery of a deed, and many others might be cited, which are equally strong in favor of the position of the Appellant. *Rathbun vs. Rathbun*, 6 *Barb., S. C.*, 98; *Roosevelt vs. Carow*, *id.*, 190; *Folley vs. Vantuyl*, 4 *Hals. R*, 153; *Rose vs. Rose*, 7 *Barb.*, 174; *Bunn vs. Winthrop*, 1 *John. Ch.*, 329; 4 *Cow. & Hill's Notes on Phil. Ev.*, 829; 12 *Ala.*, 734; *Lady Superior vs. McNamara*, 3 *Barb. Ch. R.*, 375; *Bryan vs. Wash.*, 2 *Gil.*, 557.

There are other facts in the case sufficient in my view to show that even were there no delivery in 1856, the deed was received by the grantee in the spring of 1857, previous to the execution of his mortgage to the Plaintiff. But it is unnecessary to discuss that point, as we think there was a valid delivery of the deed in the summer of 1856, and that the lien of the mortgage is prior to the conveyance to Respondents.

The judgment below is reversed.

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The Ætna Insurance Company, Appellant, *vs.* William Grube, Respondent.

A jury were sent out with permission to seal up their verdict when agreed upon, and separated; Ten of the jurors had agreed for the Defendant, and two entertained different views. In order to be liberated they drew up a verdict for the Defendant, and the two who did not agree to it voted for it under protest. They informed the officer that they had agreed, and he allowed them to separate. When the jury came into Court the two jurors who had voted for the verdict under protest, avowed the fact, and upon being again asked if it was their verdict, one assented to it, and the other refused so to do. They were sent out again and finally agreed upon a verdict for the Defendant. *Held*, that the fact of one juror having entirely changed his views while out of the jury room and separated from his fellows, was strong ground for suspicion of abuse, and that improper influences were exerted upon him. Also, that a juror has not the right to make up his verdict apart from and unaided by the light of consultation and argument with his fellows; that a jury is composed of twelve men and does not admit of separate and individual action and decision.

Where it is stipulated in a policy of insurance against fire, that the same is made and accepted in reference to conditions annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties, and one of the conditions is, that if the policy is made and issued upon a survey and description of the property insured, such survey and description shall be taken and deemed to be a part and portion of such policy and warranty on the part of the assured. *Held*, that a written application signed by the assured containing a survey and description of the property, was a *warranty* of the truth of such survey and description, and not a mere representation, and that if the survey and description were false, no recovery could be had upon the policy; that in case of *warranty* the parties stipulate the materiality of the matter warranted, and cut off all inquiry concerning it; it must be true or there is no contract; that a *representation* may be untrue and a recovery be had upon the policy, if its falsity is not material to the risk, which is always open to enquiry. But where the application contains the stipulation that the matters stated therein are a "just and true exposition of all facts and circumstances in regard to the condition, situation and value of the property to be insured *so far as the same are known to the applicant and material to the risk*," the warranty is qualified, and it becomes the duty of the Company to show the materiality of any variances from the facts stated, as they would in case of representation. The effect and extent of the warranty must in all cases be governed by the manner in which the facts are stated in the contract.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

Points and Authorities of Appellant.

I.—The Court below erred in considering any of the affidavits which were annexed to the motion for a new trial. 3 *Gra. & Wat. on New Trials*, 1452; 5 *Blackf.*, 453; 1 *Bibb*, 398; 4 *Humph*, 27; 1 *Gra. & Wat. on New Trials*, 125; 7 *Price*, 203; 1 *Gra. & Wat.*, 127.

II.—The "conversations and declarations" mentioned in the affidavits were not upon the subject matter of the trial, and could not prejudice the Plaintiff. 2 *Gra. & Wat. on New Trials*, 571; *Ib.* 572; 9 *Humph.*, 646; 2 *Va. Cases*, 479, 510; 1 *Serg. & Rawle*, 169; 12 *New Hamp.*, 474; *Pettibone vs. Phelps et als.*, 13 *Conn.*, 445.

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III.—The separation of the jury was not obtained through a compulsory or fraudulent agreement as to their verdict, after the case had been submitted to them, and they did not partake of intoxicating liquors in the jury room. The conclusions of the Court below in these respects are not sustained by the record and affidavits.

IV.—But every irregularity which would subject the juror to censure, whether in drinking spirituous liquors, separating from their fellows, or the like, should not overturn the verdict unless there be some reason to suspect that the irregularity may have had an influence on the final verdict. 2 *Gra. & Wat. on New Trials*, 564; 1 *Hill, N. Y. Rep.*, 207; 6 *Greenleaf*, 379; 2 *Sumner*, 21; 8 *Gratton*, 637; 13 *Conn.*, 445; 2 *Gra. & Wat. on New Trials*, 593–4.

V.—Notwithstanding a misdirection, if the Court can see that justice has been done, and that a new trial ought to produce the same result, a new trial will not be granted. 1 *Gra. & Wat. on New Trials*, 301, and cases cited; 2 *Salk.*, 644; 2 *Term Rep.*, 4; 5 *Mass.* 1; 2 *Pick.*, 310; *Id.* 145; 4 *Day*, 42; 5 *Id.*, 479.

VI.—All the contents of the application relating to the description of the premises insured were *warranties*, except, perhaps, the estimate of the valuation, and this under the fourth condition of the policy (folio 10,) is a representation, and its materiality was properly left to the jury. *Angel on Fire and Life Ins., p.* 178; *sec.* 147; *Same, p.* 170, *sec.* 141; 16 *Wendell*, 92; 5 *Hill*, 188; *Roberts vs. Chenango Ins. Co.*, 3 *Hill*, 501; *Angel on L. & Fire Ins., p.* 184, *sec.* 152.

VII.—The general verdict for the Defendants, disposes of every issue of fact in their favor. The Court will not consider the weight of testimony upon the several issues.

Points and Authorities of Respondent.

I.—The misconduct of the jury, as shown by the affidavits, was sufficient grounds for a new trial. *Sec.* 23, *ch.* 61, *Comp. Stats., p.* 559; 1 *Graham on New Trials, pp.* 86, 95, 99, 100, 101 *to* 103; *Horton vs. Horton*, 2 *Cowen*, 589; *Brant vs. Fowler*, 7 *Cowen*, 562; *People vs. Douglas*, 4 *Cowen*, 26; *Dana vs.*

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Roberts, 1 *Root.*, 134, *Oliver vs. Trustees of Springfield*, 5 *Cowen*, 283.

II.—The amendment allowed the Defendant to his answer, was error, the same not being in furtherance of justice. *Sec.* 94, *chap.* 60, *Comp. Stats.*, 545; *Gunter vs. Catlin*, 1 *Duer*, 253, *Bates vs. Voorhies*, 7 *Howard*, 234.

III.—The verdict was against evidence; there was no sufficient evidence to show that the Plaintiff was implicated in the firing of the building, nor of the materiality of the alleged misrepresentations in the survey. 2 *Greenleaf's Ev.*, *sec.* 408; *sec.* 152, *Angel on Fire Ins.*; *sec.* 165, 158, 176, and authorities cited; *Delonquemere vs. Tradesman's Insurance Co.*, 2 *Hall*, 589; *Jefferson Ins. Co., vs. Cotheal*, 7 *Wend.*, 72.

IV.—There was no misrepresentation or concealment, the value of the premises being stated as an estimate, there being no answer to the interrogatory in the survey as to value, and the size of the building alleged to be misrepresented was truly stated, the answer of the Plaintiff upon the subject in the survey referring to the main building, the omission to state the dimensions of the kitchen in question was not a concealment, being open to inspection, nor material, being not inquired into. *Angel on Fire Ins.*, *sec.* 150, and authorities; *Dennison vs. Thomaston M. Ins. Co.*, 20 *Maine*, *R.*, 125. Nor was the valuation, though above the true value, sufficient to avoid the policy, this not being a valued policy. *See definition*, *sec.* 253, *Angel on Fire Ins.*, *and Condition* 4 *of Policy.*

V.—The Court erred in charging upon the question of misrepresentation of value, there being no misrepresentation shown, and also in applying the rule of misrepresentation to the facts in the case.

VI.—The Court erred in his charge upon the subject of warranty, the same having no application to the case, and being erroneous in law. *Sec.* 142, 147, *Angel on Fire Ins.*, *sec.* 140, 141, *Ibid*; *French vs. Chenango County Mutual Ins. Co.*, 7 *Hill*, 122.

Van Etten & Officer, Counsel for Appellant.

Horn & Galusha, Counsel for Respondent.

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By the Court—FLANDRAU, J.—After the jury had retired and been in consultation for some time, they announced to the officer that they had agreed upon their verdict, which they sealed up, and were thereupon permitted to separate. This was a deception practised by the jury upon the officer, with a view of obtaining their release for the night. They had not agreed upon a verdict at all, but, on the contrary, two of the jurors protested against the verdict, or, as it was stated by them in Court, "voted for the verdict under protest." Whether this was a mere mental protest, unknown to their fellows of the panel, or was openly asserted, does not clearly appear, nor does it make much difference, except so far as it would go to implicate the whole jury in the fraud, or only the two protestants. It is clear that at the time the jury separated, no verdict had been agreed upon, ten of the jurors being for the Defendant, and two entertaining different views. When the jury appeared in court next morning, this condition of their deliberations, at the time of their separation, was confessed by them, one of the protestants adhering to his views, and refusing to join in the verdict, and the other yielding and assenting to the same. Now what produced the change in this juror? He had not been in consultation with his fellows since the separation, for they had not met as a jury. He must have either made up his verdict from his own reflections, in the absence of his fellows, or from improper influences brought to bear upon him, neither of which is the decision contemplated by the law. A jury is a body of twelve men assembled for consultation, argument and mutual assistance in arriving at the truth, and no single member of it has the right to make up his verdict apart from, and unaided by the others. It is very difficult to distinguish this case from that of *Oliver vs. The Trustees of Springfield*, 5 *Cow.*, 283. There the jury procured their separation by a similar artifice practiced upon the officer, and some of them were in hearing, during their separation, of conversation about the suit in which they were engaged. Here a radical change had been produced in the mind of one of the jurors during the separation, which is, to say the least, strong ground for suspicion of abuse. We cannot give our consent to verdicts procured by

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such means. There is a want of that dignity, decorum and propriety which should characterize the administration of justice about such proceedings, that if tolerated would soon withdraw from our judicial tribunals that popular reverence which is the strong arm of the law in a republic. The judge was right in his decision upon the irregularity of the verdict.

This leads us to an examination of the question of whether the facts stated in the written application were absolutely warranted to be true as stated, or were only warranted to be true so far as they materially affected the risk.

In the policy occurs this provision:

"And that this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise especially provided for."

Among the conditions annexed to the policy is the following:

"SEC. 14. When a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy and warranty on the part of the assured."

When the insurance was effected the solicitor of the company went with the insured upon the premises and propounded to him the questions contained in the written application and wrote down his answers, after which the assured signed his name to the application. This took place in the forenoon. At noon of the same day the assured went to the office of the company where the agent of the company showed the application to the insured and read it to him; upon this the policy was executed. There can be very little doubt that the survey and description, in fact the whole contents of the application was the act of the assured; and not that of the company or its agents, and that he cannot be permitted to deny it. Did it amount to a warranty, or merely a representation of the facts stated?

"An *express warranty*, * * *in the law of insurance*, is a stipulation inserted in writing on the face of the policy, on

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the *literal* truth or *fulfilment* of which the validity of the entire contract depends. The stipulation is considered to be on the face of the policy, although it may be written in the margin or transversely, or on a subjoined paper referred to in the policy." *Angel on Insurance, sec.* 140, *note* 1.

A *representation* as distinguished from a warranty in the law of insurance is "a verbal or written statement made by the assured to the underwriter, *before the subscription of the policy*, as to the existence of some fact or state of facts tending to induce the underwriter more readily to assume the risk, by diminishing the estimate he would otherwise have formed of it." *Angel on Ins., Sec.* 147.

In the law of insurance a warranty is always part of the contract, a condition precedent upon the fulfilment of which its validity depends. A representation, on the other hand, is not part of the contract, but is collateral to it. The essential difference between a warranty and a representation is, that in the former it must be literally fulfilled, or there is no contract, the parties having stipulated that the subject of the warranty *is material* and closed all inquiry concerning it; while in the latter, if the representation prove to be untrue, still if it is not material to the risk, the contract is not avoided. *Angel on Ins., secs.* 142, 147; *Burritt vs. The Saratoga Co. Mu. Fire Ins. Co.*, 5 *Hill., p.* 188.

The parties, by appropriate words in a policy, may adopt and make part of the contract any other writing not embodied in the policy, (*Burritt vs. Saratoga Mu. Fire Ins. Co.*, 5 *Hill., p.* 190, *per Bronson, J.*) and thus change what would otherwise have been considered representations into a warranty. The language used in this policy is incapable of misconstruction. It says, "when a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy and warranty on the part of the assured."

The application in this case containing the survey and description of the property, also contained this stipulation: "And the said applicant hereby covenants and agrees to and with said company that the foregoing is a full, just and true exposition of all the facts and circumstances in regard to the

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condition, situation and value of the property to be insured so far as the same are known to the applicant, and material to the risk." The warranty therefore of the statements contained in the application is not an absolute warranty that they are as stated, but only that they are true so far as the same are known to the applicant and material to the risk, which qualifies the warranty, and gives it the same effect as a representation of the facts would have. The Defendant does not treat the statements as a warranty in his answer, but as concealments and misrepresentations, and the Court in his charge to the jury confined the Defendant very properly to the issue he had made. The materiality of the variances in value and description, were questions for the jury and properly left to them, and upon the question of such materiality rests the right of the Plaintiff to recover, devolving upon the Defendant the necessity of proving that they were material to the risk. We see no error in the charge of the Court to the jury, except his treating the question of whether the survey and description were the act of the Plaintiff or Defendant as an open one for the jury. We think these matters having all been reduced to writing and signed by the Plaintiff, he was not at liberty to dispute them as his own.

There must be a new trial for the foregoing reasons.

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CATHERINE DAHL, *et als.*, Appellants, *vs.* AUGUST H. PROSS, Respondent.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

A complaint setting forth that the Plaintiff had executed, acknowledged and delivered to the obligee a bond, conditioned for the conveyance of certain real estate therein specified, upon being paid a certain amount of money; that said bond had been duly recorded; that default had been made by the obligee, in making payment according to the terms of the contract, alleging that the obligor had performed on his part all that was required by the terms of the contract, and tendering the deed in Court and asking that the Defendant be required to pay the balance due and accept the deed, at or before a time certain to be fixed by the Court, or in default thereof, that the bond be delivered up to be cancelled, and the Defendant thereafter be barred of all right, title and interest in and to the premises, states a good cause of action.

Courts of Equity have ordinarily construed such an instrument as an agreement to convey lands. It is not a mortgage, and differs widely from that instrument. In case of a bond for a deed, no sale of the premises is provided for in the instrument, or contemplated by the parties in case of default by either. If the obligor refuses to convey upon being paid according to the conditions specified, the obligee has his remedy upon the bond, or, perhaps, may have the aid of the Court for a specific performance, or a decree for the conveyance. If the obligee fail, the obligor has his remedy upon such evidences of debt as he may have received, or to have the bond cancelled. Upon such default the obligee can claim no rights, legal or equitable, and the bond is *functus officio*.

Such a bond, however, properly witnessed and acknowledged, and recorded, creates a lien upon the land, and is notice to purchasers of any equities the obligee may be able to set up against the obligor. And as a Court of Equity will sometimes interfere to relieve against a default, the existence of the bond casts a cloud or shadow upon the obligor's title, which he is entitled to have removed.

The obligee in such a bond is not entitled to a tender of a deed until payments are made in accordance with its conditions.

Points and Authorities for Appellants.

I.—There is no ground to cancel the bond—as fraud, mistake, or performance, and the bond does not run against the Plaintiff, and he is not entitled to the possession of it. *Story's Equity Juris., sec.* 703, 705, *&c.*

II.—There is no ground shown to remove the lien or cloud on the real estate, the Defendant being in possession, and the Plaintiff having his remedy at law by ejectment. *Sec.* 1, *ch.* 64, *Comp. Stats.*, 595; *Abbott vs. Allen*, 2 *John's Cases*, 524; *Devaux vs. The City of Detroit*, 1 *Harrington Ch.* 101; *Payne vs. Riley*, 4 *Dana*, 38; *Barry vs. Shelby*, 4 *Hey.*, 229; *Story's Eq., sec.* 703.

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III.—The complaint does not aver any sufficient performance of the condition of the bond, in that no deed is shown to be tendered. Nor are the premises shown to be free from incumbrances; and in other respects.

IV.—The contract should not be rescinded, there having been part performance, as payment of part of the purchase money, and the Plaintiff has not made nor offered to make restitution of the moneys received, &c. *Pintard vs. Martin*, 1 *S. & M. Ch.* 126; *Golden vs. Maupin*, 2 *J. J. Marsh*, 8; *Brown vs. Witten*, 10 *Ohio*, 142; *Edwards vs. Hanna*, 5 *J. J. Marsh*, 18.

V.—The claim to foreclose should first recognize the bond connected with the sale as a mortgage, and in that case the equity of redemption of the Defendants should be protected. *Flagg vs. Mann*, 2 *Sumner*, 486; *Hayes vs. Hall*, 4 *Porter*, 374; 1 *Hilliard on Mortgages*, 53, *n.*, 362, 414, 599, 659, 83, 95.

Points and Authorities for Respondent.

I.—The bond outstanding and being of record, a Court of Equity will interfere to prevent a possible mischief, and disembarrass the Plaintiff's title of the cloud created by the registration of the bond. *Willard's Eq. Jur.*, *pp.* 303, 328, *&c.*, *&c.*; *Story Eq. Jur.*, *sec.*, 705, 705, *a.*, and cases; *Rev. Stats.*, 406, *sec.* 3.

II.—The Plaintiff "stands in the shoes" of the obligor in the bond, although not personally liable; the land is charged with the terms of the bond, and performance is compulsory upon him. *Rev. Stat.*, 406, *sec.* 3; *Story, Eq. Jur.*, 2*d vol.*, *pp.* 784, 788; *Eq. Pl.*, 492–3; 6 *J. Ch. Rep.*, 402.

III.—The complaint avers a tender of performance on the part of the obligor, of all things by him to be performed, sufficiently. *Rev. Stats.*, 542, *sec.* 78.

IV.—Part payment of the purchase money is not such "part performance" as to obstruct the relief sought.

V.—The bond is a conditional sale, and has none of the elements of a mortgage, and therefore the obligee has no

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equity of redemption. 2 *Hill. on Mort., p.* 337; 1 *Ib.*, 61 *to* 74, *&c.*; 6 *Modern Reps.*, 2; 4 *J. Ch. Rep.* 559.

HORN & GALUSHA, Counsel for Appellant.

J. B. BRISBIN, Counsel for Respondent.

By the Court—ATWATER, J.—On the 21st of March, 1857, one Randall executed and delivered to Catharine Dahl a bond for a deed of certain premises in the City of St. Paul. The condition of the obligation was to execute to the said Catharine Dahl a good and sufficient warranty deed upon being paid the full sum of six hundred dollars, with interest at ten per cent., according to the condition of four promissory notes, bearing even date with the bond. The bond was acknowledged and recorded in the proper office. Two of the notes for one hundred dollars each, were due long previous to the commencement of this action and remained unpaid, after demand. The Plaintiff is assignee of the estate of Randall, and owner of the land described in the complaint. The complaint sets out these facts in full, alleges that the Plaintiff before this action duly tendered performance of the conditions to be performed by said Randall, to the Defendant Dahl, offers to bring the said notes into Court to be delivered up and cancelled, and asks judgment that the said bond may be cancelled, and that the said Catharine Dahl and all others claiming under or through her, may be barred and foreclosed of all estate, right or interest in the premises.

To this complaint the Defendant demurred on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and Defendant appealed.

The instrument described in the complaint is a contract for the conveyance of land upon the performance by the Defendant of certain conditions therein specified. It is not indeed strictly such in terms, and is in fact only a security to the purchaser in the amount of the penalty; but Courts of Equity have ordinarily construed it as an agreement to convey. It is not a mortgage, and differs widely from such an

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instrument. The latter is given by the owner or holder of the legal title of property, to secure (ordinarily) his contract to pay money. A bond for a deed is an instrument given by the owner of real estate to convey the same upon being paid money. The mortgage, upon default being made in its conditions, expressly authorizes a sale of the premises, and the right of redemption as provided by statute is incident to such sale, unless otherwise ordered by the Court. In case of a bond for a deed, no sale of the premises is provided for by the instrument, or contemplated by the parties, in case of default by either. If the obligor refuses to convey upon being paid according to the conditions specified, the obligee has his remedy upon the bond, or perhaps may have the aid of the Court for a specific performance, or rather, a decree for the conveyance. If the obligee fail, the obligor has his remedy, upon such evidences of debt as he may have received, or to have the bond cancelled.

In this case the obligee has failed to comply with her agreement of payment for the land, and under the bond, can claim no rights legal or equitable in the premises. The bond is *functus officio*, and no action can be maintained upon it, either at law or in equity, against the obligor, his heirs or assigns. She can neither ask to have the premises sold, nor the money she has paid refunded, for there is no contract between the parties requiring it, or even remotely looking to such result. Nor are we aware of a single authority which holds, that in a case, such as is presented in the complaint, the obligee is entitled to ask such relief. The instrument is clear and plain, and no mistake can possibly arise as to its meaning, or the rights of the parties under it. The complaint presents the Defendant as in default in complying with her agreement, without a single extenuating circumstance, and consequently as entitled to no relief whatever, either at law or in equity.

It is nevertheless true, that the Defendant, even after default, may have equities under the instrument, which the Court will protect, when made acquainted with them. If any exist, they should be presented by answer. A Court certainly cannot consider them on demurrer—that admits, with-

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out in any manner excusing the default. Where time is not of the essence of the contract, a Court of equity may allow the party to make payment, after the agreed time has elapsed, and require the deed to be executed. But this Court is not at present advised that the Defendant desires any such privilege. It may be, that she would prefer to lose the land, than even now to pay the balance due upon it. This Court will not interfere to grant privileges or equities, which are not asked for. And much less to make an entire new contract for the parties, and require the Plaintiff either to refund the moneys paid, or to sell the land for the purpose of giving the Defendant a right of redemption, as it is argued by counsel would be the proper course.

The instrument in this view of the case being void at law, and the legal title to the premises being vested in the Plaintiff, I have had some doubt as to whether the Plaintiff has set forth a sufficient cause of action to entitle him to the aid of a Court of Equity; but upon full reflection, am of the opinion that he is entitled to the relief demanded. By *section* 1, *p.* 405, *Comp. Stat.*, it is provided that such bond, properly witnessed and acknowledged, may be recorded, and by *Sec.* 3 of the same chapter, that when recorded, it shall be notice to, and take precedence of any subsequent purchaser or purchasers, and shall operate as a lien upon the lands therein described, according to its import and meaning. And although no personal action can be maintained on the bond against the Plaintiff, yet the bond creates a lien upon the land, and the purchaser of Randall's interest, (the Plaintiff,) takes it subject to any equity the Defendant may be able to set up against the obligor in the bond, and will be decreed to convey the land in the same manner as his vendor. (*Story's Eq. Jur.*, § 784, 788, and cases cited.) The power of a Court of Equity to order the setting aside or cancelling of an agreement or bond, even where the instrument is absolutely void, either by statute or by the principles of the common law, and when no action can be maintained thereon, and the other party has a perfect defense in a Court of law, is now too well settled to be questioned. (*Willard's Eq. Jur.*, *p.* 303; 5 *Paige*, 501; 1 *John. Ch.*, *p.* 517; 2 *Story's Eq. Jur.*, §

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694.) The only question which can arise upon the subject is as to the class of cases, or particular cases, in which the power will be exercised. And upon this point, the Chancellor in *Hamilton vs. Cummings*, 1 *John.*, above cited, remarks, that "the cases may all be reconciled on the general principle, that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence not arising upon its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation."

The "special circumstances peculiar to this case," which seem to render the interference of the Court expedient, are that the bond has been recorded and become a lien upon the land, and certain payments having been made thereon, so long as the bond is outstanding, it leaves a question in regard to the title, which the Plaintiff is entitled to have set at rest. Although the bond has not been complied with according to its terms, yet as a Court of Equity will sometimes interfere to relieve against a default, it may be that the Defendant has equities under the bond which a Court will protect. If so, he should be required to present them now, or be barred from raising them hereafter. The existence of the bond casts a cloud, or shadow at least, upon the Plaintiff's title, which he is entitled to have removed. The interference of the Court in a case like the one at bar, where the instrument sought to be cancelled affects the title to real estate, is even more appropriate than in the case of an ordinary money bond, where the obligor is only personally liable. Where the Defendant is in possession of the premises described in the bond, it is questionable whether the action of ejectment would afford a full and complete remedy; but even if it would, we do not think the Plaintiff is confined to such action. It may be that the Plaintiff will still be put to his action of ejectment to recover possession of the premises, but if so, the issues then

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to be determined will be relieved of all questions touching the equities arising under this bond, if any such there be.

The general allegation of the Plaintiff that before this action he duly tendered performance of the conditions to be performed by the said Wm. H. Randall to the Defendant Catharine Dahl, is sufficient. So long as the Defendant is shown to be in default, it does not in fact appear that there are any conditions precedent to be performed by the Plaintiff, and the Defendant is not entitled to a tender of the deed until payments are made in accordance with the conditions of the bond.

The judgment below is affirmed.

PETER YOSS, Appellant, *vs.* FREDERICK DE FREUDENRICH, *et al.*, Respondents.

A complaint, setting forth that the Plaintiff had executed, acknowledged and delivered to the obligee, a bond conditioned for the conveyance of certain real estate therein specified, upon being paid a certain amount of money, that said bond had been duly recorded, that default had been made by the obligee in making payment according to the terms of the contract, alleging that the obligor had performed on his part all that was required by the terms of the contract, and tendering the deed in Court and asking that the Defendant be required to pay the balance due and accept the deed, at or before a time certain to be fixed by the Court, or in default thereof, that the bond be delivered up to be cancelled, and the Defendant thereafter be barred of all right, title and interest in and to the premises, states a good cause of action.

An answer to such complaint, admitting the default, and stating that the property at the time of the purchase was worth the agreed price, but had since greatly depreciated in value, that the Defendant was desirous of redeeming the property, and paying the amount due, but that by reason of the great depreciation of the value of said property and the great difficulty that exists, in raising moneys and securities in this state, and by reason of the stringency of the times since the payment became due, he could not at this time, nor within a short time raise sufficient moneys to pay off the balance due, and that if an early day is fixed for the foreclosure of his equity of redemption in said property, it will be impossible for him to make such redemption, and he will wholly lose the property, constitutes no defence to the action.

In considering the relief to which the Plaintiff is entitled, regard may properly be had, to the amount agreed to be paid by the Defendant for the land which he contracted to purchase, the amount which he has actually paid, and the time which has elapsed since forfeiture. Where the amount of the purchase money is considerable, and the Defendant has paid the larger portion of the same, it is equitable that he should have more time granted to save an entire loss of the land or sum paid than where he has advanced but a small part of the agreed price.

The complaint stated that on the 13th April, 1857, the Plaintiff was seized and possessed of certain real estate, de-

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scribing it. That on that day he bargained the said real estate to the Defendant Frederick, and gave to said Frederick a bond, in the penal sum of $13,000, conditioned to deed to the said Frederick the said premises, upon the payment by the said Frederick, or his assigns, of the sum of $6,400, by instalments, to wit: $900 cash; $1,100, July 1st, 1857; $2,000, February 1st, 1858; and $2,500, April 13th, 1859, according to the conditions of three notes made by said Frederick. That after the making of said bond, the said Defendant Frederick, by the license and permission of the Plaintiff, went into possession of the said real estate. That on the 23d October, 1857, the Defendant Frederick, by an instrument in writing, duly assigned his interest under said bond to the Defendant Edmund; the bond and assignment both being duly recorded about the time of their execution. The complaint then states that neither of the Defendants have paid the last instalment of the $6,400, according to the terms of the third promissory note, either at the time it became due, or since. That on the due date of the said third note, and ever since, Plaintiff has been ready and willing to execute to the Defendants, or either of them, a deed upon being paid the amount due by said last note, and is still ready and willing so to deed, and now brings the deed into Court, to be delivered to the Defendants, upon their compliance with the terms of said note. That the Defendants refuse, and have refused to comply with the said conditions. The complaint then demands that the Defendants may be decreed to pay the amount of said note by a day certain, or to be barred of all interest or estate in the said premises.

The material portions of the Defendant's answer are set out in the opinion of the Court.

The Plaintiff demurred to the answer, upon the ground that it did not state or set forth facts sufficient to constitute a defence to the cause of action.

The following decision was filed in the Court below:

The answer does not state facts sufficient to constitute a defence, as that term is generally understood and used in plead-

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ing under the Code. That is, there are no facts stated which either can or are claimed to defeat the Plaintiff's cause of action. But the facts set forth in the answer (some of them at least,) are such as the Court should know before rendering judgment, and which may affect or modify the judgment to be rendered. They are matters which in a Court of Equity, bear upon the Plaintiff's present right to a final decree, and may thus be said to constitute an equitable defence, not to the cause of action, but to the particular relief sought.

The Plaintiff has an undoubted right, for aught that appears in the answer, to commence an action to foreclose the equitable interest of the Defendants in the premises described in the bond. But he asks that it be done now, and without allowing said Defendants any time for redemption. The case is analogous to a strict foreclosure. If the Defendants had not appeared, the prayer for relief must be granted; but they appear and set up facts which may induce the Court to refuse the relief sought at this time, and decline to render a final decree until a future day. Possibly, too, it may be considered equitable to order a sale of the premises, upon such terms and conditions as will best secure the interests and rights of all parties.

I cannot see any valid objections to allowing Defendants, situated as they seem to be, to set up proper facts, by way of answer, rather than by affidavit, petition, cross bill or otherwise, on or pending the application for judgment by the Plaintiff. If such facts are material, and not admitted, issue can be joined by a reply. If they ought not to be considered at all in the action, a motion for judgment on the pleadings would enable the Plaintiff to obtain his relief, and at once, without prejudice. If material and immaterial facts were set up, a motion to strike out would be effectual, and in either case, a speedy decision would be reached.

Without holding that the Defendants are entitled to all the relief prayed for in their answer, it appears to me that some facts are stated which ought to be taken into consideration by the Court before rendering a final decree—facts which may be held to constitute a defence to the kind of relief demanded in the complaint, especially as regards the time when it

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shall be granted. The demurrer is overruled, without prejudice to the right of the Plaintiff to move upon the pleadings, either for judgment, or to strike out portions of the answer, or for a reference, or for such other relief as he may deem he is entitled to, including the usual time for reply.

Points and authorities of Appellant.

I.—The Court below erred in holding that an answer is good which does not state facts sufficient to constitute a defence. The Court says that although there are no facts stated which either can or are claimed to defeat the Plaintiff's cause of action, yet some of the facts set forth in the answer are such as the Court should know before rendering judgment, and which may affect or modify the judgment to be rendered, and then overrules the demurrer, without prejudice to the Plaintiff's right to move for judgment on the pleadings, or to strike out, or reply.

It is difficult to perceive how an answer can be good and entitle a Defendant to judgment on demurrer, which does not contain facts sufficient to constitute a defence. The answer, under the Code, is analogous to a common law plea, and not to an answer in Chancery. The act of 1853 abolished Chancery proceedings, and enacted that equitable remedies should be sought in the form of civil action. The Code prescribes what the answer shall contain, *i.e.*,

1st. A denial;

2d. A statement of any new matter constituting a defen ce, or counter claim. *Comp. Stats., p.* 541. If the answer contains neither the one nor the other of these, it cannot be a good answer under the Code, and however desirable it may be that certain facts should be presented to the Court, it is clear that if they do not constitute a defence or counter claim they do not constitute an answer. In what other way they should be presented, whether by affidavit or otherwise, is not material at this time. It is sufficient that they do not constitute a defence, and therefore cannot be a good answer. The Court says we may move for judgment on the pleadings, or reply. What would be the difference between moving for judg-

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ment on the pleadings and this demurrer? Both the motion and demurrer would admit only such facts as were well pleaded, and which, if true, would be a defence whole or partial; and if the facts did not constitute a defence, a reply would, of course, raise only immaterial issues. The ground taken by the Court below is, therefore, clearly untenable. Either the answer is good or bad—a defence or not a defence. It cannot be both good and bad. A judgment on demurrer is for the Plaintiff or Defendant. The order sustains or overrules the demurrer, consequently the judgment to be entered on this order would necessarily be a judgment for the Defendant. On the decision of a demurrer one or the other party must necessarily be entitled to judgment; and the logical legal sequence of the holding of the Court below, is, that the Defendants, having put in an answer which does not constitute a defence, are entitled to judgment. We have only to remark that this view of the law will greatly facilitate the defence of actions.

II.—The answer does not constitute a defence. The answer is thrown together in one mass, but we think it may be divided, and considered in the manner we have adopted in the statement of the case:

1st. The bond was given on a sale of the land, and was entered as a mortgage, and on this allegation is founded the prayer that the instrument be decreed a mortgage.

It will be remarked here that the answer does not pretend to allege any mistake or fraud, nor is it alleged that the bond is otherwise than as described in the complaint, but, on the contrary, expressly admits it, and adds, that although a bond, such as we have described, it was intended to operate as a mortgage. We submit that it is not competent for the Defendants to set up any such intent. They have chosen a certain legal instrument to carry out their intentions, and they are conclusively presumed to have intended whatever is the legal effect of such an instrument. *Hunt vs. Ronsmaniere*, 1 *Peters*, 1; 7 *Curtis* 419.

III.—The second defensive proposition of the answer consists in the allegation, that at the time of the bargain, $6,500 was agreed upon as the actual value, and was the actual value

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of the property. We have only to say that an agreed valuation is generally an element of a bargain, or it would be somewhat difficult to make a bargain.

IV.—The third defence is that real estate generally has depreciated in value since the date of this bargain, and this particular real estate has depreciated from $6,500 to $4,000. Suppose it had depreciated to $10,000, and Defendants had brought this suit to compel Plaintiff to convey, would not the defence be equally good?

V.—That the Plaintiff entered upon the premises May 15, 1861, and has since remained in possession, and on this Defendants found their modest demand to be put back in possession. Even had this instrument been a mortgage, after Default Plaintiff would have had the right to enter, provided he did not do it forcibly, so as to subject himself to a writ of forcible entry. The New York Statute is the same as ours.

"If," says Denio, J., in *Bell vs. Ulman*, 18*th New York R.*, 142, "the mortgagee obtains possession, without force, he is entitled, as well since as before the Statute, to hold it as against the mortgagor, and cites 14 *Wend.*, 233; 15 *Wend.*, 248; 20 *Wend.*, 260; 24 *Wend.*, 164; 2 *Sand*, *S. C. R.*, 325, *Casey vs. Bultoph*, 12 *Barb.*, 637. Now there is no pretence in the answer of any forcible entry. It sets up that Plaintiff entered, and says it was wrongful and unlawful, because, without their permission. Much less is such an allegation any defence to this action, where the instrument is a bond.

VI.—The next phase of the answer is that Defendant Edmund wants to redeem, but is, from want of means, unable to do so, and the property is so depreciated that he cannot raise money on it; but he thinks if the Court will make a new contract with him, giving him several years more time, he thinks he may grow richer, or the land more valuable, and he be able to raise money on it, &c. When he bought the land he doubtless thought it would increase in value; but it decreased. Suppose it should continue to decrease, how would his ability be then. It is humiliating that courts should be compelled to adjudicate upon such positions.

VII.—The property, say the Defendants, is ample security for all sums due, or to grow due on the note, for three years

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to come. Another prophecy, and from hitherto false prophets. If it be such good security, let the Defendants borrow the money on it, fulfil their contract, obtain the title which we offer, and secure their loan on the land. Aside from its immateriality, if true, how absurd for the Defendants to talk about the sufficiency of the property as security, when their whole idea of defence is founded on the hard times, and their inability to raise the money on the property or otherwise.

Points and authorities of Respondent.

I.—That the party who commits the first fault in pleading, must fail on demurrer, and that this demurrer to the answer will enable us to examine demurrable defects in the complaint. *Loomis vs. Youle*, 1 *Minn. Rep.*, 175.

II.—The complaint does not state facts sufficient to constitute a cause of action, or to entitle the Plaintiff to the relief he seeks, or to any relief whatsoever.

(Under this point were cited the same authorities cited on the part of the Appellant, in the case of *Dahl et al., vs. Aug. H. Pross, ante p.* 89.)

The Defendants have answered in this action, to which answer Plaintiff demurs, on the ground that it does not state facts constituting a defence.

The Plaintiff's counsel has (in his brief,) arranged and blocked out the Defendant's answer into distinct parts, each of which he pleases to term "defensive propositions of the answer," and then comments upon them singly and separately, as if each were pleaded as a separate defence to his cause of action. He complains, in the outset, that the "answer is thrown together in one mass;" but he thinks "it may be divided," and proceeds to do so, as to each allegation of fact, as if each were pleaded as a separate defence. We notice this simply from the fact, that it shows that the learned counsel has not perceived the intent of the Defendants in their pleading, which was not so much to interpose a plea in bar, or a perfect defence, technically speaking, to the cause of action, but to place upon the record all the facts and circumstances attending the sale of the property, the execution of the bond,

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the partial fulfilment of its terms, the nature, situation and value of the property—all of which facts, (and not any single one of them,) as detailed in the answer, they claim constitute a defence to the Plaintiff's cause of action, in so far, that they (if proved as alleged,) will stop a strict foreclosure of the contract in suit, and so change the nature of the Plaintiff's relief, as to apply to the contract the provisions of the act of the Legislature, granting three years' redemption. *Stat. of Minn.*, 1860, *p.* 275, *secs.* 1 & 2. So that the decree in this case, instead of appointing thirty days, or six months, within which the Defendants are to perform, or be barred, &c., shall be made to conform to said law above cited, which provides, " that any real estate hereafter to be sold upon the execution, judgment, order or decree of any court, or upon the foreclosure, by advertisement or otherwise, of a mortgage, contract or liability, shall be held," &c., &c.

In other words, the Defendants have interposed their cross bill " to obtain full relief to all parties, touching the matters of the original bill." *Story's Eq. Pl.*, *Sec.* 389-90, 1, 2, 3; *Stat. of Minn.*, *p.* 540, *sec.* 58; *Story's Eq. Pl.*, *sec.* 849.

Allis & Peckham, Counsel for Appellant.

Van Etten & Officer, Counsel for Respondents.

By the Court—Atwater, J.—Upon the demurrer to the answer in this case, the Defendants claim the right to attack the complaint, and show that it contains no cause of action, or is in other respects demurrable. This practice obtained under the old system of pleading, and has been sanctioned by this Court, at least to the extent of all defects in the complaint that would not be aided by verdict. (*Smith vs. Mulliken*, 2 *Min.*, 319.) The objection to the complaint here raised is, that it does not state facts sufficient to constitute a cause of action.

The complaint in this case is substantially the same so far as the cause of action is concerned, as in *Pross vs. Dahl*, decided at the present term. In that case a demurrer was

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interposed to the complaint on the sole ground that the complaint did not state facts sufficient to constitute a cause of action. We held the complaint good, and the reasoning in that case, being equally applicable to the present, it will be unnecessary to enlarge on this objection of the Defendant.

The only question therefore requiring consideration is, did the Court below err in overruling the demurrer to the answer; or in other words, does the answer state facts constituting a defence to the action? The relief demanded by the complaint is, that "the said Defendants may be ordered and adjudged on or before a day certain to be fixed by this Court to pay or cause to be paid the amount due on said note, and to receive the deed of said premises, hereby tendered by this Plaintiff. And that the amount due on said note may be assessed and ascertained by this Court or under its direction. And that in case the said Defendants fail to pay said money so to be found due on said note, on or before the day so to be fixed, that then the said Defendants and all persons claiming under them, &c., may be forever barred and foreclosed of all right, claim, title or equity, of, in or to the said lands," &c.

The answer admits all the material allegations of the complaint, and alleges that the property, at the time of the purchase, was worth the agreed price ($6,500), but that by reason of the great depreciation in the value of real estate, it is not now worth, or of a greater value than $4,000.

"That the said Defendant, Edmund De Freudenrich, is desirous of redeeming the said property and of paying the amount which may be ascertained to be justly and legally due upon the said third promissory note; but he respectfully shows to the Court and states, that by reason of the great depreciation of the value of said property, and the great difficulty that exists in raising moneys or securities in this state, and by reason of the stringency of the times since the date of the maturity of the said third promissory note, the said Defendant cannot at this time, nor within a short time, raise sufficient moneys to pay off the balance due and to become due upon said note, and that if an early day is fixed for the foreclosure of his equity of redemption in and to said property, it will be impossible for him to make such redemption.

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Whereby the said property will become wholly lost to the said Edmund," &c.

The answer then further states, that the Defendants believe that in one year from this time the said property will be of much greater value and will sell to much better advantage than it will in the present time of depression in real estate, and that in three years from this time, or in a much less time, the said Defendant will be able to raise an amount of moneys, amply sufficient to redeem the said property, under a sale for the amount due and to become due, with costs of sale, and that the property is ample security for all sums of principal and interest which can legally or justly accrue upon the said note, for the next four years, and that an extension of the time of sale under the decree to be made in this action and of the right of redémption after said sale, according to the laws of this State as they now exist, in case of like securities and mortgages upon real estate, will not prejudice the Plaintiff's said security, and will be in accordance with equity and good conscience. And asking, in conclusion, (among other things not deemed material,) that a sale of the premises be decreed after nine months, and the Defendant be permitted to redeem at any time within three years thereafter, upon payment of the amount with interest, &c., for which the premises shall be sold.

The Court below, in its opinion on file overruling the demurrer, says, that "the answer does not state facts sufficient to constitute a defence, as that term is generally understood and used in pleading under the code. That is, there are no facts stated which either can or are claimed to defeat the Plaintiff's cause of action. But the facts set forth in the answer (some of them at least,) are such as the Court should know before rendering judgment, and which may affect or modify the judgment to be rendered. They are matters which, in a Court of Equity, bear upon the Plaintiff's present right to a final decree, and may thus be said to constitute an equitable defence, not to the cause of action, but to the particular relief sought."

Section 66 of *p.* 541, *Comp. Stat.*, provides what the answer must contain, which must be either, 1st, a denial of each alle-

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gation of the complaint controverted by the Defendant, or, 2d, a statement of any new matter constituting a defence or counter claim. Unless the pleading can be brought within one or the other, or both these provisions, it is not admissible as an answer, either at law or in equity, since the form of pleading in both classes of actions is the same. The distinction attempted to be made between a defence to the cause of action, and to the particular relief sought, I do not think is well taken. The relief proper to be granted in any particular case must depend upon the cause of action, and an answer which stated facts showing that the Plaintiff was not entitled to the relief sought, or only to a part of the same, would constitute a defence to the cause of action, or a defence *pro tanto*, as the case might be. But even if any distinction of this kind does exist, we think the Court erred in holding that there is any new matter set up in the answer which constitutes a defence "to the particular relief sought," or of which it is necessary that the Court should be informed, before rendering final judgment in the case.

The making of the notes, and default in payment being admitted, the Defendant can have no legal claims upon the Plaintiff with reference to the property in question. He is remediless at law. If he seeks the aid of a Court of Equity, he must satisfactorily excuse or justify his default, and tender a performance of the contract of which he seeks the advantage, so far as the same may be possible, or in other words, he who asks the aid of a Court of Equity, must himself be ready to do equity.

The parts of the answer above quoted contain the only excuse or justification of his default, which the Defendant has to present. No fraud, accident, surprise, or any reason out of the ordinary course of events, is offered to excuse a default of some two years in performing his contract. The only reason assigned why he has not paid his note is, the great depreciation of real estate, and the stringency of the times. I presume no case can be found in the books, where a Court of Equity has relieved against a default on such a plea. So far as this part of the answer is concerned, it must be governed by the same rules that would apply to the consideration of a

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bill filed by the Defendant against the Plaintiff for specific performance. Such was the case of *Benedict vs. Lynch*, 1 *J. Ch.*, 370, in which the Plaintiff had been in default and in which the Chancellor says, that "it is incumbent on the Plaintiff, calling for a specific performance, to show that he has used due diligence, or, if not, that his negligence arose from some just cause or has been acquiesced in; that it is not necessary for the party resisting the performance to show any particular injury or inconvenience; it is sufficient if he has not acquiesced in the negligence of the Plaintiff, but considered it as releasing him." To the same effect is *Hatch vs. Cobb*, 4 *J. Ch.*, 559. There are no allegations or proof in the case, that the Plaintiff ever agreed to extend the time for the performance of the contract on the part of the Defendant, nor that the delay has been by the Plaintiff's consent. The Defendant therefore fails in establishing the first step, the very ground work of his defence; and were he bringing a bill for a specific performance, and tendered the balance due on the contract, I do not know on what principle the Plaintiff could be decreed to convey, if he objected to so doing.

But in this case the Plaintiff offers to waive his legal rights, and asks that the Defendant either now comply with his agreement, or that the same be abandoned. To this the Defendant in substance answers, that he has not the money, and cannot now do it, and that if the relief asked by the complaint is granted, he must lose what he has already paid on the land. And thereupon asks, that the land be sold after nine months, and that he be allowed three years after such sale, to pay the amount bid, and redeem under the sale.

How it can be for a moment claimed that there is anything in these allegations, or requests, in the answer, constituting a defence to the cause of action, or relief sought by the complaint, we are at a loss to determine. The Defendant not only fails to excuse his default, but wholly fails to show any valid reason for not complying with his engagement even now. For if the reason stated, to wit, the "stringency of the times and the difficulty of raising money," be sufficient ground for releasing a man from his contract, a wide door would be opened for the exit of unfortunate debtors, and but few con-

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tracts remain of binding force. And if the fact, that unless further time be given the Defendant will lose what he has already paid, be good ground for an extension of time, there are probably but few mortgages foreclosed in this State in which the same plea could not be truthfully urged. If the Defendant were filing a bill for specific performance, and tendered, or brought the balance due in Court, his claim would have perhaps greater equity on account of the amount already paid, but even then, it would only be regarded as a circumstance in his favor, and by no means conclusive of his right to the relief. *Lead. Cas. in Eq., vol.* 2, *part* 2, *p.* 14; 4 *Ves.*, 686; 13 *Ves.*, 225; 4 *J. Ch. R.*, 559.

But the Defendant asks more than an extension of time. He asks a complete change of the contract, that a bond for a deed be changed to a mortgage, the Plaintiff divested of his legal title to the premises, and to have the same equity of redemption which he would enjoy under an ordinary foreclosure sale in Court. The Defendant in his pleading and on the argument, speaks of his equity of redemption, under this bond, and seems to take it for granted that he has such right of course. In this, he is entirely mistaken. No such right exists or is given by the terms of the instrument itself, or is granted by statute, or any authoritative construction of the law. Whether he has any equities of any kind entitling him to further indulgence, can only appear by the allegations of his answer, and proofs made thereon. In this case no equities are shown, save such as arise (if any) from the payment of a part of the purchase money, and as that fact appears from the complaint, the Court is as well prepared to render judgment without the answer as with; there is nothing therein stated which constitutes a defence.

It is true, that the Defendant, in view of the amount paid upon this purchase, may, perhaps, suffer a hardship in granting the relief demanded by the complaint. But if so, it is in no measure owing to the fault of the Plaintiff, and that circumstance alone has never been considered a good ground for relieving a party from the obligations of his contract. If the Defendant has bought upon speculation, depending upon the rise of property to raise means to pay the purchase money,

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and the result has disappointed his expectations, he must be content to abide his loss. As the Plaintiff would not have been permitted to repudiate his contract, and decline to execute a deed, had the property greatly appreciated in value, so must the Defendant be governed by the same rule, when the result is directly opposite. These fluctuations in the value of real estate are in the ordinary course of events, and furnish no ground of relief in equity to a party affected by them. "It would be dangerous," says Lord Erskine, in 12 *Ves.*, above cited, "to permit parties to lie by, with a view to see whether the contract will prove a gaining or losing bargain, and, according to the event, either to abandon it, or, considering time as nothing, to claim a specific performance, which is always the subject of discretion." Here the Defendant asks the privilege of lying by some three or four years longer, (having already had more than two years after default,) and then if he shall choose, come in and take the property; not even then offering to pay the balance now due, but only such sum as the property may bring when sold at public auction. If the property continues depreciating in value during that time, to the same extent which the Defendant alleges it has depreciated since the purchase, it is easy to see the Plaintiff would come far short of realizing the amount due him with interest. And it is manifestly impossible to prove that such result will not occur. The relief demanded by the Defendant, might, therefore, prove highly inequitable to the Plaintiff, and such as a Court of Equity could not grant upon the facts stated in the answer.

In no aspect of the case, therefore, does the answer state a defence; and it only remains to consider what should be the judgment of the Court upon the facts stated in the complaint. In considering the relief to which the Plaintiff is entitled, regard may properly be had to the amount agreed to be paid by the Defendant for the land which he contracted to purchase, the amount which he has actually paid, and also the time which has elapsed since the forfeiture. Where the amount of the purchase money is considerable, and the Defendant has paid the larger portion of the same, it would seem equitable that he should have more time granted to save an entire for-

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feiture of the land or sum paid, than where he has advanced but a small part of the agreed price. The Court may, perhaps, also have some regard to the monetary condition and general financial embarrassments of the country at the time of, and since the forfeiture of his agreement by the Defendant, though considerations of this nature should be entertained with caution, as, from the nature of the case, no settled or satisfactory rule can be stated which can afford a guide in determining the indulgence that should be granted. That must rest in the sound discretion of the Court, and its exercise will not be interfered with by a court of review, except an abuse of the same is shown.

We will remand the cause to the District Court, which can determine the amount due the Plaintiff, and direct a judgment or decree in his favor, to the effect, that, in default of payment of the amount due, within six months from the filing of this decision, the bond be declared cancelled, and the Defendants, and all persons claiming through or under them, be barred and foreclosed from all claim, &c., in accordance with the prayer of the complaint.

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ROGER AGIN, Plaintiff in Error, *vs.* MARIA T. HEYWARD, Executrix, &c., Defendant in Error.

ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

Under the State Constitution, the District Court is a Court of general jurisdiction, and has original jurisdiction in civil actions, although the amount in controversy may be less than one hundred dollars.

The District Court has original jurisdiction in every case where the Constitution itself does not clearly confer it on some other court. This jurisdiction extends to all causes which the Legislature may, in its discretion, authorize other courts to take cognizance of, because the discretion may never be exercised, or not to the extent authorized, and it is necessary, in the meantime, for some court to have the jurisdiction. The authority possessed by the Legislature, to confer on other courts a portion of the jurisdiction vested by the Constitution in the District Court, does not imply the right to deprive the latter of such jurisdiction, but simply to authorize other courts to exercise it, concurrently with the District Court, in such cases.

The claim for lien in this case was filed in the office of the Register of Deeds, under the act of Aug. 12, 1858. *Stat. of Minn., p.* 696.

The amount claimed to be due was less than one hundred dollars, to wit, $69 75, with interest from September 5, 1858. Summons served August 6, 1860. The demurrer to the complaint raises the simple question, whether or not the District Court could entertain jurisdiction of such an action, when the amount claimed to be due is less than $100.

Points and Authorities of Plaintiff in Error.

The only question in this case is, whether a person having a lien upon real estate, for work and labor, under the Mechanic's Lien Law, of August 12, 1858, upon which there is a balance due of less than $100, can enforce his lien by original suit in the District Court.

We claim that he can, because it is an equitable proceeding. Before the code, the party could have enforced such a lien only by suit in Chancery.

The District Court has original jurisdiction in such matters *Statutes, p.* 478.

This jurisdiction is not taken away by the Code, but only the form of proceeding changed. The lien can only be enforced by judgment of the District Court. A justice of the

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peace has no power to do anything towards enforcing the lien.

The lien may be established and enforced by the District Court, without giving any personal judgment in the matter.

Points and Authorities of Defendant in Error.

1.—The District Court has original jurisdiction in all cases, both in law and in equity, where the amount in controversy exceeds one hundred dollars. *Const., Art.* 6, *sec.* 5, *Stat. of Minn., p.* 478, *sec.* 3.

2.—"The Statutes of the State give original jurisdiction of all matters involving one hundred dollars and less, (with the exceptions in the Statutes contained,) to the courts of Justices of the Peace, exclusively, and all matters exceeding that amount to the District Courts exclusively. The object of the acts is to 'limit' the jurisdiction of the Courts." *Castner & Hinkley, vs. Chandler & Green*, 2 *Minn.*, 86.

3.—The Statute abolishing a separate Chancery practice, makes an exception in favor of actions for the "foreclosure and satisfaction of mortgages," without regard to the amount in controversy. *Stats. of Minn., p.* 480, *sec.* 2. But makes no exception in favor of a civil action to enforce a lien, even admitting that it is an equitable action.

4.—But this is not an "equitable action." On the contrary, it is always regarded by the Courts as a most inequitable proceeding, and is never extended beyond the strict letter of the statute. *Knox & West vs. Starks, Sears, et als.*, 4 *Minn.*, 20; *McCarty vs. Van Etten*, 4 *Minn.*, 461; *Baily & Gilman vs. Mason & Craig*, 4 *Minn.*, 546; *Farmer's Bank vs. Winslow*, 3 *Minn.*, 86.

It is, in every respect, a civil action for the recovery of the debt. And by force of the Statute, and of the Statute alone, an extraordinary remedy, or lien, is given for the security of the debt. There is no appeal to the equitable interposition of the Court. A certain state of facts alone, set forth in the complaint, will entitle the party to this extraordinary relief. But the slightest departure from those pre-requisites will deprive him of his lien, and no appeal to the equitable interfer-

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ence of the Court would give him a *status*. The claimant must depend alone upon a strict performance of the Statute. As well might we call the proceeding by attachment, or any other extraordinary proceeding, given by Statute, an equitable proceeding, as the one under discussion.

5.—It is not necessary to discuss the question, whether or not a Justice of the Peace can enforce the lien or not. He alone has jurisdiction of the cause of action, and the claim (made by the Plaintiff in Error,) that the "lien may be established and enforced by the District Court, without giving any personal judgment on the matter," cannot be entertained for a moment.

SMITH & GILMAN, Counsel for Appellant.

VAN ETTEN & OFFICER, Counsel for Respondent.

By the Court—EMMETT, C.J.—The only question involved in this case, is whether the District Court has jurisdiction to enforce a mechanic's lien, for a sum less than one hundred dollars. The statute directs the action to be brought in that Court whatever the amount, but the Defendant insists that by the Constitution the District Court cannot take cognizance of any action, in the first instance, where the amount in controversy is less than one hundred dollars. On the other hand the Plaintiff contends that this is an equitable proceeding, and that the District Court has original jurisdiction of all matters in equity.

The Constitution vests all the judicial power of the State in certain Courts, therein enumerated or provided for. It confers no original jurisdiction on the Supreme Court. The Legislature may however give it such jurisdiction in "remedial cases," but without legislative action the Supreme Court is strictly a Court of Appeal. The jurisdiction of the Probate Courts is expressly confined to "estates of deceased persons, and persons under guardianship. No original jurisdiction is given absolutely to Justices of the Peace. The Legislature however is authorized to prescribe what their duties and compensation shall be, but cannot extend their

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jurisdiction to any civil cause, where the amount in controversy exceeds one hundred dollars, nor to any criminal cause where the punishment exceeds three months' imprisonment, or a fine of over one hundred dollars; nor to any case involving the title to real estate.

It will be observed that the constitution vests absolutely no original jurisdiction whatsoever in the Courts already mentioned, except that given to Probate Courts over estates of deceased persons, and persons under guardianship, but leaves the matter wholly to the wisdom of the Legislature, within certain specified limits. That is to say, the Supreme Court and Justices of the Peace are made capable of receiving original jurisdiction to a certain extent, but without legislative action such jurisdiction does not exist. The Legislature may therefore decline to give to the former Court cognizance of any action or proceeding in the first instance—or it may limit the jurisdiction of the latter to any particular class of actions, or to causes involving fifty dollars only, or any other amount not exceeding one hundred dollars; and may forever decline establishing the additional Courts authorized by the constitution. So far then as regards the Supreme and Probate Courts and Justices of the Peace, they are Courts of limited or special, and not of general jurisdiction.

The judicial power of a State is co-extensive with the power of legislation. The Courts under our Constitution are the sole repositories of this power; and they have it independent of the action or nonaction of any other department of the government. The constitution created all the Courts necessary to the exercise of the power conferred; and although the Legislature is authorized to establish others inferior to the Supreme Court, yet as the necessity for such additional Courts may never arise, all the judicial power conferred must in the mean time be exercised by the Courts already provided.

How then is this power distributed by the organic law? Appellate jurisdiction in every case is given to the Supreme Court. But, as we have seen, original jurisdiction, except over estates of deceased persons, and persons under guardianship, is not directly conferred on either of the Courts before mentioned. And although the Legislature may authorize

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them to take cognizance of certain causes, yet as that body may never act, or having acted, may repeal or modify at pleasure, the jurisdiction in the meantime must necessarily reside in some other court or courts; for unless jurisdiction over every case in which a person has a right of action exists in some tribunal, there may be a total failure of justice.

There is but one other, the District Court, named in the constitution, and that Court by its constitution is capable of receiving and exercising, and we believe was intended by the organic law to receive and exercise, in the first instance, all the judicial power not vested by that instrument in other courts. It is, in our opinion, the one great court of general jurisdiction to which all may apply to have justice judicially administered, in every case where the Constitution itself does not direct application to be made elsewhere. Each of the others is expressly confined to certain limits, or the jurisdiction, which may be conferred on it, is expressly limited. But the powers of the District Court are neither defined nor restricted by the constitution; nor does its original jurisdiction depend in any degree upon legislative action.

The constitution declares that "the District Courts shall have original jurisdiction in all civil cases, both in law and equity, where the amount in controversy exceeds one hundred dollars, and in all criminal cases where the punishment exceeds three months' imprisonment or a fine of over one hundred dollars; and shall have such appellate jurisdiction as may be prescribed by law;" but there are no words of limitation as to the original jurisdiction, as there are in regard to every other court.

It may be urged however that there is an implied limitation to this jurisdiction, under the rule, that what is not enumerated is necessarily prohibited. But we could not apply that rule to the clause just recited without denying jurisdiction to all the courts in a great variety of cases. Numerous examples might be cited, but one alone will be sufficient to show the difficulties to be encountered in limiting the jurisdiction of the District Court in the manner suggested. Take as an illustration an action involving title to real estate, in which the parties are entitled to a trial by jury,

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and when the value of the property in controversy is less than one hundred dollars. The Supreme Court is expressly denied jurisdiction in any such action. So are the Probate Courts. So also are Justices of the Peace, and the Legislature has established no other court capable of trying it. What court then can entertain the action? The only court not expressly prohibited from trying an action of this kind is the District Court; and yet if that court is limited to such cases only as are enumerated in the section above recited, the action cannot there be tried, because actions involving title to real estate are not expressly mentioned, and if the value of the property in controversy is less than one hundred dollars, they are certainly not implied. It is not contemplated by the constitution that there can be a total failure of justice in any case, and we could not adopt such a construction or interpretation of that instrument, as would admit the possibility of there being a legal right that could not be judicially enforced, or a wrong without a remedy therefor in the law. The bill of rights declares that every person is entitled to a certain remedy in the laws, for all injuries which he may receive in his person, property or character. *Sec.* 8, *Art.* 1. This includes the enforcement of rights as well as the redress of wrongs. But how can we carry this provision or declaration into effect, if we deny, to the tribunals, in which the judicial power is vested, jurisdiction in any given case? There must of necessity, therefore, be some court of general jurisdiction, and among those established by the constitution, the District Court is the only court not limited by express words—the only one not in fact prohibited from entertaining original jurisdiction beyond specified limits.

The Defendant's counsel has referred us to the decision we made in *Castner and Hinkley vs. Chandler and Green*, 2 *Min.*, 86, and insists that it is decisive of this case. That was a case involving the jurisdiction of the District Court under the act of Congress organizing the Territory of Minnesota, and the laws passed by the Territorial Legislature, in pursuance of said act. We think there is nothing in that decision inconsistent with our present holding. The "organic act" so called, did not attempt to define the jurisdiction of the territo-

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rial courts so far as cases arising under the territorial laws were concerned, but left it wholly with the Legislature to determine what the jurisdiction of each should be, and to distribute the judicial power among the several courts as it might deem proper; only providing that jurisdiction in certain cases should not be conferred by the Legislature on Justices of the Peace. "The jurisdiction of the several courts herein provided for, both appellate and original * * * shall be as provided by law" is the language of the "organic act." In distributing the judicial power, the territorial legislature enacted, that Justices of the Peace should have cognizance and jurisdiction amongst other matters, of actions "arising on contract for the recovery of money, if the sum claimed does not exceed one hundred dollars," and it was also enacted that the District Courts should have original jurisdiction in all civil actions "where the sum in controversy shall exceed one hundred dollars, and in all civil actions whatever the amount in controversy, in which a Justice of the Peace has not jurisdiction."

In the case referred to we held substantially that neither the District Courts nor Justices of the Peace had any distinct jurisdiction, in cases arising under the laws of the Territory, except such as was conferred by the statutes, and that it was evidently intended by the statutes above recited, to give original and exclusive jurisdiction of all matters involving one hundred dollars or less to Justices of the Peace; and to the District Courts exclusive jurisdiction of all actions wherein the sum in controversy exceeded that sum.

We are unable to see that the rule of construction applied in *Castner & Hinckley vs. Chandler & Green*, conflicts in the least with that adopted in the present case. Under the Territorial organization the several courts had only such jurisdiction as the Legislature saw proper to confer. Under the State organization, the constitution defines or limits their jurisdiction, and so far at least as concerns the District Court, the Legislature can neither increase or diminish its original jurisdiction. In the one case, the judicial power was distributed by the Legislature, in the other by the constitution itself; but in either case, we regard the distribution, when made, as a distribution of all the judicial power; and that when a particu-

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lar jurisdiction is thus given to one court, it is necessarily exclusive, unless the contrary clearly appear. We construed the statutes above referred to as though they were a part of the organic act of the Territory, and had the same language been used in our constitution, it would have received the same construction. We endeavored to give effect to the intention of the Legislature in the former decision, and think we are carrying out the intent of the framers of the constitution in the present. It seemed clear to us that the Legislature meant to give to the District Courts and Justices of the Peace, exclusive jurisdiction over the several matters confided to them, and it is equally plain that the Constitutional Convention intended that the District Courts should be courts of general jurisdiction, and conferred on them all the judicial power not expressly given by the constitution to other tribunals.

If the constitution had conferred the judicial power of the State on the Supreme Court, District Courts and Probate Courts only, and had then declared that the first should have appellate jurisdiction in every case, and the last should be limited to jurisdiction over estates of deceased persons, and persons under guardianship; no one would ever have doubted that all the judicial power not vested in the Supreme and Probate Courts, belonged of necessity to District Courts; because it could reside nowhere else. Nor do we think this interpretation would be changed, although by subsequent sections the Legislature were authorized to establish other courts in addition to those named; or another court were named, upon which certain powers might be conferred. Had such been the language of the article on the judiciary, it would at once have been said, that as all the judicial power had, in the first instance, been apportioned between the Supreme, the District, and the Probate Courts, the mere authority given to the Legislature to establish or confer certain jurisdiction on other courts, did not deprive those in whom jurisdiction was first vested, of any portion of the power conferred on them.

But wherein does the language of the constitution differ, in effect, from that above suggested? I confess, if there be a substantial difference, that I am unable to perceive it. The article on the judiciary first vests all the judicial power in

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certain courts. Particular jurisdiction is then given absolutely to the Supreme Court and Probate Courts, leaving all the remaining judicial power conferred, to the District Court as the only one capable of exercising it, without legislative authority. It is, however, provided, that additional jurisdiction may, by law, be given to the Supreme Court, that additional courts may be established, and that Justices of the Peace may be authorized to take cognizance of cases to a limited extent; yet the exercise of this power by the Legislature does not necessarily deprive any court of the jurisdiction previously conferred on it by the constitution. The establishing of criminal or commercial courts, and conferring upon them jurisdiction over cases now heard and determined in the District Court, would no more deprive the latter of its jurisdiction of those cases, than the giving of the Supreme Court original jurisdiction in remedial cases, excludes the District Court of its jurisdiction over the same, or the giving appellate powers to the District Court interferes with the appellate jurisdiction of the Supreme Court; nor should the fact that the Legislature have given jurisdiction to Justices of the Peace to the full extent authorized by the constitution, oust the District Court of jurisdiction in such cases, any more than the election of court commissioners, with the judicial powers and jurisdiction of a Judge of the District Court at chambers, took from the District Judge the power to transact chamber business.

We are, therefore, constrained to hold that the District Court has original jurisdiction in every case where the constitution itself does not clearly confer it on some other court. That this jurisdiction extends to all causes which the Legislature may, in its discretion, authorize other courts to take cognizance of; because the discretion may never be exercised, or not to the extent authorized, and it is necessary, in the meantime for some court to have the jurisdiction. And that the authority possessed by the Legislature to confer on other courts a portion of the jurisdiction vested by the constitution in the District Court, does not imply the right to deprive the latter of such jurisdiction, but simply to authorize other courts to exercise it, concurrently with the District Court in such cases.

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The Defendant in the court below demurred to the complaint, on the ground that the Court had no jurisdiction of the action, the amount of the Plaintiff's claim being less than one hundred dollars. And the Court having sustained said demurrer, and entered judgment thereon for the Defendant, the said judgment is reversed, and the case remanded, with directions to overrule the demurrer, and enter judgment for the Plaintiff, unless, upon cause shown, the Defendant have leave to answer over.

JOHN M. CASTNER, Appellant, *vs.* JACOB G. GUNTHER, Respondent.

In an action between adverse claimants, brought under the provisions of the Act prescribing rules and regulations for the execution of the trust arising under the Act of Congress relating to the entry of town sites, the Supreme Court is required, upon appeal, to review and pass upon questions of fact as well as of law, and must examine the evidence, and determine for themselves what facts are established.

The Defendant in such an action, cannot deny the title of the Plaintiff, except upon the terms of setting up a valid title in himself.

Where the occupants of a town site have made proper application to have the lands entered for their use and benefit, and have shown, by proofs adjudged to be sufficient, that they have performed the conditions necessary to entitle them to have the land so entered, their right to the lands is perfected, and no person can thereafter, by mere settlement and improvement, acquire a right, under the law, to any portion of said town site, as against said occupants.

Where, upon an appeal from the decision of the Register and Receiver, and of the Commissioner of the General Land Office, the Secretary of the Interior decided that the application to enter a town site should have been allowed—and directed the local office to permit the entry to be made in accordance with such application and decision—the local or other land offices cannot, by requiring or permitting the lands to be entered upon a new application, or upon new or additional proofs, or by a person or officer other than the one who made the application upon which such decision was rendered, impair the rights of the occupants to the full benefit of the decision made in their favor.

If, after the Judge of the proper county has made an application to enter a town site, his term of office expire before a final decision allowing such entry, and his successor is permitted to make the entry in accordance with such application and decision, the lands will be held by the latter upon the same trust as though they had been entered by the officer who made the original application.

The decision of the Secretary of the Interior, of December 18, 1857, in favor of the entry of the town site of Mankato, was rendered upon the application of Judge Chatfield, and upon proofs thereon submitted by the occupants, on the 21st of March, 1856, and the entry thereof on the 6th of March, 1858, though made by Judge Flandrau, was for the purpose of carrying into effect the decision in favor of Judge Chatfield's application; and was allowed and approved upon the proofs previously, on the 21st of March, 1856, submitted, and not upon proofs offered at the instance of the Register and Receiver, at the time of such entry.

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This is one of a large number of cases pending in the District Court of Steele county, (upon change of venue from Blue Earth county,) brought by certain parties claiming under the Municipal Pre-Emption Law of 1844, the land having been entered as the town site of Mankato, on the 6th day of March, 1858.

This cause was tried before a Referee, upon whose report judgment was entered in favor of the Defendant. The Plaintiff appealed to this Court from the judgment entered on the Referee's report.

The issues of law arising in the case were partially settled in the case of *Leech vs. Rauch*, 3 *Minn.*, 448.

The opinion contains a full statement of the issues of law and fact, as contained in the pleadings, as well as a review of the facts proved upon the trial.

Points and authorities of Respondent.

1st.—In this case is involved the construction of an act of Congress passed May 23d, 1844, entitled "An Act for the relief of citizens of towns upon lands of the United States, under certain circumstances," as both parties claim deeds of lands entered under the provisions of said act.

2d.—The said act of Congress is not a Pre-Emption Law, and only provides for the entry of towns; it does not contemplate building towns, but allows the entry of towns made. It is an act for the relief of citizens of towns, &c.

3d.—A person must be an occupant of the lot which he claims, within the meaning of the Act of Congress, or he is not entitled to a deed therefor; and it must be for town purposes. *Ontanagon Town Site Case*, *Vol.* 6, *Mich. R.*, *p.* 149.

4th.—A person must be an actual occupant (and citizen) of the lot, to entitle him to the deed. Constructive occupancy is not known to the law of Congress. *Ibid.*

5th.—The Act of Congress contemplates vacant lots which would be impossible under the theory of constructive occupancy. *Ibid.*

6th.—The State Courts have nothing to do with what transpired at the Land Office as to what proof was offered, who

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offered it, nor, indeed, whether any proof at all was offered. *Leech vs. Rauch, vol. 3, Minn. R., p.* 448.

7th.—The Act of Congress allows the entry of the lands embraced in a town, by a trustee, for the use and benefit of the occupants, and authorizes the Legislatures of the States or Territories to make rules and regulations for the execution of the trust, for the disposal of lots, and the proceeds thereof. The Legislative Act of the Territory, of March, 1855, directs the trustee to convey the same to the person or persons who shall have, possess, or be entitled to the right of possession or occupancy thereof, according to his, her, or their several and respective rights or interest in the same, as they existed in law or equity, at the time of such entry of such lands. *Session Laws*, 1855, *p.* 29, *sec.* 2.

8th.—No equities could arise to the title to the land in favor of any person, until the entry. No party could claim any equities to enforce a title until the town was actually, and in fact, entered; for the law guarantees nothing to the settler, or citizen even, but provides a means through which relief may be obtained. There is no law making it the duty of any officer or person to enter it in trust. *Ontonagon Town Site Case.*

9th.—The proofs upon which the town was entered, were offered upon the application of Judge Flandrau, March 6th, 1858, and it is immaterial whether a new application, or a new proof was necessary or not.

10th.—The Land Officers, or the Department, cannot by any acts or ruling of theirs, settle the rights of the parties in this case. These rights depend upon the construction of a law, which is exclusively within the jurisdiction of the judiciary.

Sanford & Beveridge, Counsel for Appellant.

Willard & Barney, Counsel for Respondent.

By the Court.—Emmett, C.J.—This is an action between adverse claimants to certain lots in the town of Mankato, brought under our Statute of March 3, 1855, the lands em-

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braced within the town having been entered by the County Judge, under the provisions of the Act of Congress, of May 23, 1844, commonly called the "Town-site Law."

The action provided by this Statute, for determining the interests of adverse claimants, is, in some respects, peculiar, especially in regard to the pleadings, and the manner of determining questions of fact upon an appeal, or writ of error; and these peculiarities will first receive our attention. It is first provided, that each and every person claiming to be a beneficiary of lands entered as a town site, under the Act of Congress above referred to, shall, within a certain time, file with the person or authorities who may have so entered the same, a statement containing an accurate description of the particular lot, part or parcel claimed, and his specific right, interest, or estate therein, or be forever barred of all right to claim or recover the same. When, if there are adverse claimants, and their controversy is not settled by agreement in writing between the parties, or by arbitration within three months from the time of the entry, either party may then bring an action against the other in the District Court. The Plaintiff, in such action, is required to state in his complaint the lots or lands claimed by him, and to set out his own title; but merely alleges as to the Defendant, that he claims some interest or estate therein, or some portion thereof. The Defendant, then, is not at liberty, as in an ordinary action to recover the possession of real property, simply to deny the allegations of the complaint, and put the plaintiff to the proof of his case. He cannot deny the Plaintiff's right or claim to the lands, without he sets forth his own title thereto; and if he fails so to state his own title, his denials may be stricken out on motion, and judgment rendered for the Plaintiff. The pleadings, as thus made up, simply put in issue the merits of the several titles; and the party having the better title, which is determined by priority of claim and settlement, recovers as against the other, notwithstanding he may not have such a title in himself as would have enabled him to maintain ejectment.

If the Defendant cannot deny the title of the Plaintiff without setting up his own, it follows that he must set out a

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title, which, if proved, would be good in itself; otherwise he might avoid the requirement of the Statute, and obtain all the benefits of a denial, and put the Plaintiff to proof, by merely setting up a title, confessedly sham or frivolous. I take it that the Statute must be complied with, according to its spirit and intent, and that a Defendant cannot dispute the title of the Plaintiff, unless he states one in himself, which would be good if the facts stated were to be admitted as true. And if in this the party Plaintiff has any advantage of position, the fault lies in the Statute itself. The main objects of requiring each party thus to spread the particulars of his title upon the record, would appear to be, that the Court may be enabled to determine whether it is valid, as stated, and to advise the other party of the facts on which the claim is based.

If, therefore, the Plaintiff in this action had set forth a title bad upon its face, the Defendant might have demurred; but if, on the other hand, the Plaintiff has stated a title, which, if admitted, would entitle him to a deed of the lots claimed by him, it is good as against the Defendant, and cannot be disputed until the Defendant sets up in himself one equally as good; and if the title of the Defendant, as stated by himself, is imperfect or bad upon its face, he is in no better condition than if he had not answered at all.

The complaint alleges that the Plaintiff, and nine others whom he names, on or about the 14th day of February, 1853, settled, occupied and improved certain described lands, under the Act of Congress of May 23, 1844. That afterwards they and those claiming under them, caused an application to be made to enter said lands, under the Act of Congress. That the same were thereafter duly entered in trust for them, and those holding under them, and that prior to the commencement of this action, he became, by partition, relinquishment and conveyance from the original claimants, entitled to a several property in the lots which are the subject of controversy. These facts, if true, entitle the Plaintiff to the property, as against any one not claiming by a prior settlement or occupancy.

The Defendant denies each of the allegations material to the Plaintiff's claim, and alleges a title in himself, by vir-

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tue of a settlement and improvement made on one of the lots in March, 1857, by one Ulrich, the grantor of the Defendant, and on the other lot by himself, in April of the same year.

Now, whether the Defendant can have the benefit of these denials of the Plaintiff's title, depends, as we before stated, upon the sufficiency of the title which he sets up in himself; and this, in turn, depends upon the condition of the title to the lands within the town, at the time of the alleged entries by Ulrich and the Defendant, in March and April, 1857. That is to say, whether said lands were then so situated that any person could acquire title to any portion thereof, by an original entry, claim and occupancy, under the law of 1844.

There is nothing in the pleadings themselves which will enable us to determine the exact condition of affairs in regard to the title to the lands within the limits of the town at this time. The answer, it is true, alleges that the land was then government land, and that the entries by the Defendant and Ulrich, were long prior to the time the town was entered by the county judge. But this, of itself, is not enough; for as we shall endeavor to show, the right to a title to these lands may have become fixed, or vested in prior occupants, long anterior to the date of the actual entry by the judge, and long prior to the time when the claim of the Defendant is alleged to have originated. We must, therefore, resort to the evidence to ascertain the facts by which we can determine when the lands ceased to be the lands of the public, and when the rights of the occupants, for whose use and benefit the lands when entered, became vested—and if it shall be found that the title of the Defendant, as stated by his answer, had its origin subsequent to this time, it follows not only, that he acquired no rights by the settlements under which he claims, but is in no condition to deny the title of the Plaintiff, if the complaint alleges an entry, settlement and occupancy, at a time when the right to a title might thus be acquired.

In examining questions of fact in cases arising under the act of March 3, 1855, the appellate court cannot, as in ordinary civil actions, content itself with the finding of the inferior tribunal, if sufficient evidence can be found to sustain the

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verdict of the jury, or decision of the judge or referee; but the Statute makes it the duty of the Court, on the request of either party, to review and pass upon all questions and conclusions of fact as well as law; and to this end, all the evidence is required to be reduced to writing, and included in the return to the appellate court. And if the judgment of the Court below is reversed, even on a question of fact, we are obliged to make a final disposition of the case in accordance with our own finding, except in the single instance where the fact has been passed upon by a jury, in which case only, a new trial must be awarded in the Court below.

This, in effect, gives to the parties an appeal from the decision of the facts, as well as the law, and the questions come to us, as original questions, to be determined by the evidence before us, and without regard to former findings; for, as we cannot avoid the responsibility of passing upon questions of fact as such, we must be permitted to determine for ourselves as to what facts are established.

The policy of imposing such a duty upon this Court, especially in cases where the facts depend upon the conflicting testimony of witnesses, examined in open court, may well be doubted; but as the facts which we deem material to the decision of this case, are mostly, if not wholly established by record evidence, we have less hesitation in drawing our own conclusions, than we should feel, had they depended upon oral testimony alone.

The following facts are, in our opinion, fully established by the evidence in the case:

That, in the autumn of 1855, shortly after the lands had been surveyed by the general government, Judge Chatfield, as the county judge, (there being no corporate authorities,) made application to enter, under the provisions of the Act of Congress of May 23, 1844, certain lands therein described, as a town site, by the name of Mankato, in trust for the use and benefit of the occupants thereof. That, in pursuance of such application, proof of a compliance with the requirements of said act, was submitted at the proper land office, on or about the 21st day of March, 1856. That, thereupon, the local land-officers held and decided, upon the proofs so submitted, that

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the said applicant was entitled to, and might enter under said act, all the lands embraced in said application, except fractional lot No. 3, which said lot 3, was then claimed as an agricultural pre-emption by two different claimants, to wit: Rathbun and Maxfield. That as to said pre-emption claimants, the said land-offices decided against the claim of the said Rathbun, but were equally divided in opinion as to the claim of the said Maxfield. That an appeal was thereupon taken to the Commissioner of the General Land Office, from that part of the decision, refusing to permit said lot 3 to be entered as a part of the town site; but the decision respecting the right to enter the remainder of the lands included in Judge Chatfield's application, was not appealed from; nor does it appear that the right to enter such lands, for the benefit of the occupants, was ever contested by any one, but the whole contest was confined to said fractional lot, 3. That the lots which are the subject of controversy in this action are not included in said lot 3, but are within that portion of the lands applied for, which was, at the outset, adjudged to belong to the occupants of the town. That this contest respecting the right to said lot 3, was, upon appeal, decided by the Commissioner of the General Land Office, in favor of Maxfield, one of the pre-emption claimants. That upon a further appeal, this contest was, on the 18th day of December, 1857, finally decided in favor of the town site, and the local officers were thereupon instructed "in pursuance of said decision," to permit said lot 3 to be entered as a part of the town site, as well as the other lands described in the original application, and about which there had been no dispute. That the original decision, made March 21, 1856, awarding to the occupants all but lot 3, being made upon proofs then submitted, depended necessarily upon the settlement, occupancy and improvements shown to have been made prior to that time. That the final decision as to lot 3, depended, as between the pre-emption claimants and the occupants of the town, upon the facts as they existed at the time the pre-emptors entered upon the said lot, which was sometime in 1855; and that the proof of these facts, whenever taken, whether before the original decision of the Register and Receiver, or afterwards, while

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the appeal was pending, were directed almost exclusively to what had been done or omitted prior to the time of the pre-emption claimant's entry. That the several decisions as to the right of Judge Chatfield to enter the lands, whether made by the local office, or upon appeal, were predicated wholly upon proofs which were before the tribunal making such decision. That the final decision in favor of the right of the occupants to all the lands included in Judge Chatfield's application, was not made contingent upon anything thereafter to be done, except to enter and pay for the lands; and it was directed, by the tribunal making such decision, that the entry should be permitted in accordance therewith. That by said final decision it was in substance and effect, adjudged and determined, that at the time of Judge Chatfield's application to enter the town site of Mankato, he was entitled, and should have been permitted to enter, for the use and benefit of the occupants, all the lands embraced in his application. That prior to said final decision, Judge Flandrau, having succeeded Judge Chatfield in the office of Judge, made a new application to enter as the town site of Mankato, all the lands embraced in the application of Judge Chatfield, except said lot 3; and the local officers permitted him so to enter; but upon this becoming known to the department at Washington, such entry was summarily set aside as unauthorized and irregular, the Commissioner expressly holding and deciding that no new application was necessary. That after the setting aside of this entry, and after the final decision of the Secretary of the Interior, the local officers being directed to permit the lands to be entered by the proper person or authority in pursuance of said decision, Judge Flandrau, as the then Judge of the proper county, made a new application to enter the lands, in accordance with the decision of the Secretary of the Interior. That this application was in fact, although not so specified in the application, made by Judge Flandrau as the successor of Judge Chatfield, in accordance with, and for the purpose of securing to the parties entitled thereto the benefit of said final decision. That although two witnesses were examined at the time of this new application by Judge Flandrau, yet

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it does not appear that any new facts were elicited, or that any of the improvements by them mentioned were made since the date of Judge Chatfield's application, while the settlement and laying out of the town are stated to have been done prior to that time. That the parties desired, and at first applied to have this entry made upon the proofs which had already been submitted and passed upon by the Secretary of the Interior; and that the additional proofs were offered at the instance and suggestion of the Register and Receiver who expressed doubts as to whether the department would otherwise approve of the entry. They however avowed their willingness to dispense with further proofs. That it does not appear that any importance was attached to these new proofs by the department; on the contrary the question of the right of Judge Chatfield to enter all the lands applied for had been determined, upon the proofs already submitted, and the instructions to the Register and Receiver were in direct terms "to permit the entry" of certain lands, describing them as in Judge Chatfield's application, and to transmit the certificate and receipt in a special communication. That thereupon Judge Flandrau was permitted to enter the same lands which the Secretary had adjudged to belong of right to the town, and the officers allowing said entry made return thereof as directed, together with the additional proofs taken, and the entry, being afterwards approved, was by order of the department directed "to be patented in the order, and at the same time it would have been patented in the regular series, had the entry been permitted on the 21st of March, 1856, the date on which the proof was submitted to the district office."

In view of these facts then, when did the interest of the occupants become vested in that portion of the town in which the lots here in controversy are situated? Was it as early as A. D. 1855, when Judge Chatfield made his application to enter, or at the time that the proofs were submitted in March, 1856, or not until the actual entry by Judge Flandrau?

In *Leach vs. Rauch*, 3 *Min. Rep.*, 448, th is Court expressed its views of the law of 1844, as applicable to the entry of the town of Mankato, so far as it was necessary in order to decide the action then pending; and it was then in substance decided

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that, when the occupants of a town have complied with the requirements of the act of 1844, or at farthest, when they have, by proofs found to be sufficient, shown that they have so complied, they are *eo instanti* entitled to the benefits of that act, and to have the trust established and declared in their favor; that so far as the occupants were affected by the mere date of the entry, if the town site of Mankato was entered upon the proofs submitted on the 21st day of March, 1856, then the entry, although not made until March 6, 1858, related back to the time when the proofs were submitted, and that when once the conditions are shown to have been performed the rights of the occupants attach then, if not before, and cannot in any manner be affected by a delay on the part of the government to issue the patent.

This decision was upon the ground that the rights of the occupants, after they have done all that the law requires of them, cannot be lessened or otherwise prejudiced by the government delaying the discharge of its duty. And the principle applies with equal force to delays in permitting the entry after a favorable decision has been rendered; to delays in rendering the decision after the necessary facts have been established by competent proofs; and, for anything that I can see to the contrary, to delays in hearing the case after the application to enter has been made. But if the rights of the occupants who have performed all the conditions necessary to entitle them to enter, are not fixed, as against the government, and all who come afterwards, as early as the date of their aplication to enter, or at least when sufficient proof thereof has been submitted; but remain indeterminate and uncertain in extent, and subject to be reduced by the coming in of new occupants up to such time as the land officers will permit the entry of the lands, or render their decision; or to such time as they, in their discretion, may adjourn the hearing, after the filing of the application and tender of proofs; then they are wholly at the mercy of the land officers, and any one else, who may see fit to oppose the entry of the town. After application made, and proofs tendered, the local officers may be unable, possibly unwilling then to hear it, and therefore may adjourn the hearing to suit their convenience, or whim,

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and when at length a hearing is obtained, the decision may be still deferred. And if the right to enter be contested by a pre-emption claimant the matter is still worse, for whether the contestant be a *bona fide* claimant or a mere volunteer, time must be given to both parties to prepare and produce their proofs; and although the local officers may at once decide against the pre-emption claimant, yet he has the right to appeal, first to the Commissioner of the General Land Office, and then to the Secretary of the Interior. All this consumes time, and it can readily be seen how, in this way, and without any fault of the occupants, the actual entry may be deferred indefinitely.

That the entry of the town of Mankato was allowed and approved upon the proofs originally submitted in March, 1856, and that taken afterwards during the contest, but before the decision of the Secretary of the Interior, we do not entertain a doubt; and although at the instance of the Register and Receiver, additional, but merely cumulative evidence, was submitted, at the time of the actual entry, yet it does not by any means follow that this proof alone was the predicate of the entry.

We might however admit, for the purpose of the argument, that these new proofs of facts previously proved to the satisfaction of the department, were all that were taken into consideration at the time of the entry and subsequent approval; and yet, the occupants having shown that, at the time of Judge Chatfield's application, they had performed all the conditions necessary to authorize him to enter the lands for their use and benefit, and the tribunal of the last resort having so adjudged, it would not be in the power of any officer or set of officers, to deprive occupants of their rights under this decision, by requiring or permitting an entry to be made upon other proofs, or by another applicant. Judge Flandrau would hold the title, even in such a case, in trust for the benefit of those interested under the decision of the Secretary of the Interior, and stand in the same relation to the beneficiaries under the trust, as Judge Chatfield, had he continued in office and been permitted to make the entry.

It is however claimed by the Defendant's counsel, upon

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the authority of a decision of the Supreme Court of the State of Michigan, that the individual occupants of towns entered under the act of 1844, can take such lands or lots only as are in their actual possession, and that any lands or lots not so occupied, belong to the citizens at large, or to the town for the common benefit of all. I have always inclined to this opinion, but as Justice Flandrau has declined taking part in the decision of this case, the other members of the Court have not been able to agree upon the abstract proposition here presented. We do not however see how the proposition whether true or false, can affect the decision of this case; for after the right to enter the lands for the benefit of the occupants, is once established, it would be equally unjust to permit them to be interfered with, by those who may come afterwards, whether the lands are all to be divided among those occupying them, according to their respective interests or claims, or a part belongs to the town at large. In the one case the trespass is upon the individual occupant,—in the other upon the rights of the whole body of the inhabitants of the town.

The Defendant's title is predicated upon the assumption that up to the time of the actual entry of a town site, under the act of 1844, every one has the right to settle upon and occupy any vacant lot or parcel, and may by these means secure the title after the entry is made. Now whatsoever may be the rights acquired by such a settlement, if made prior to the time of the performance of the conditions necessary to authorize the entry of the lands as a town site, we cannot recognize this right after these conditions have been performed by prior occupants, and they have not only made application to have the same entered for their use and benefit, but have shown by proofs adjudged to be sufficient, that they are entitled to have the land so entered. In *Leech vs. Rauch*, we held that when this had been done, the right of the occupants to receive the benefit of the Act of Congress is as perfect as it can ever become, and that the right exists in favor of the persons who have performed the conditions on which it is based. This ruling, applied to the present case, disposes of the Defendant's claim of title, for, as we have found, the oc-

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cupants of the town, as early as March 21, 1856, showed by proof adjudged to be sufficient, that they had performed all the conditions necessary to entitle them to have entered for their use and benefit, the lands, of which the lots here in controversy are part and parcel, and this was long before the date of the settlements under which the Defendant claims title.

Had these facts appeared from the pleadings, then the title stated by the Defendant would have been bad upon its face, because at the time stated in the answer, no one could acquire title to the lots by mere settlement and occupancy, and the setting up of such a defective title would not have authorized the Defendant to deny the title set up by the Plaintiff. The title being defective, the denials would have been stricken out, which would have left the Plaintiff's title confessed.

We are of opinion that the answer was bad, because it set out a defective title in the Defendant, in that it did not show that the entries or settlements under which the Defendant claims, were made at a time, when the right to a title could be thus acquired. The mere allegation that they were made long before the town was entered by the Judge is not sufficient, as we have endeavored to show, because the right to the lands thus entered, might have been, and as the proofs show, was actually vested in the occupants of the town, long before the entry by the Judge.

But even admitting that the answer was not bad on demurrer, or would not have been stricken out on motion for this alleged defect, it does not necessarily follow that the Plaintiff must in the trial of the case be put to the proof of his title, unless we should hold that the omission of the Defendant to allege a fact material to his title, but which fact does not affect the title of the Plaintiff, puts the Defendant in a better position, than if he had alleged the fact, and gives to him the benefit of denials, which otherwise he would not have been entitled to make. If the Defendant by concealing a fact on which his title depends can put the Plaintiff upon his proofs, then the provision of the statute which makes the denial of the Defendant contingent upon his stating a title in himself is avoided at the will of the Defendant, and the whole

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object of the provision is frustrated; for the Defendant has only to avoid stating the fact in his answer, and although the Plaintiff on discovering the omission, may allege its existence in the reply, yet the Defendant is not even then put to a denial, because no further pleading is necessary to put the fact at issue. We do not think the statute can thus be avoided, and are of opinion that a Defendant does not state his title within the meaning of the statute when he omits any fact on which that title depends. And if he does so omit, and on the trial the fact is found to exist, we are disposed to hold that he is then in the same condition that he would have occupied had the fact been stated in the answer.

It is not necessary to the recovery of the Plaintiff in this action, that his title as alleged, should be taken as admitted by the pleadings. There is abundant in the evidence to satisfy us that the town was first settled, laid out and occupied by the Plaintiff and the other persons named in the complaint, and that they and those claiming under and through them performed the conditions necessary to bring the lands within the provisions of the act of 1844. That they and those claiming under them were occupants, within the meaning of said act, at the time of Judge Chatfield's application to enter, at the time the proofs were submitted upon which the decision of the Secretary of the Interior was made, at the time of said decision and at the time of the actual entry by Judge Flandrau; and that they, according to their respective interests, are beneficiaries under the trust created by such entry, to the utter exclusion of all who claim by settlement or occupancy subsequent to the time when these conditions are shown to have been performed, That although the original entry and settlement made by the persons named, may have been for the joint interest of all, yet they had a right to and did sever their interest. That by such division the lots here in controversy fell to the share of the Plaintiff. That he has ever since claimed them in severalty, and that none of those, who were originally joint claimants, nor any one claiming through them or either of them, are shown to claim these lots, or any interest therein adversely to the claim of the Plaintiff.

And as matter of law applicable to these facts, we hold,

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that the sufficiency of the proofs to justify the decision of the Secretary of the Interior, and the entry of the lands in accordance therewith, cannot be the subject of inquiry in actions between claimants under such entry. That the Plaintiff's occupancy and claim in severalty, of lots in which others are jointly interested, is good as against a mere stranger, and whether the deed conveying the interest of the other joint claimants to the Plaintiff was void or not, if the grantors therein have not claimed adversely to him and filed the statement of their claim as required by the act of 1855, their claims are barred. And that as against the Defendant, the Plaintiff is entitled to a deed for the lots which are the subject of this action.

Numerous questions as to the admission and rejection of testimony, by the referee, were raised on the argument, which, under the view we have taken of the whole case, it will be unnecessary to consider in detail. We will only say generally, in regard to them, that all testimony concerning improvements or claims, made by others than those through whom the parties claimed title, was irrelevant and should not have been admitted. That it was improper to admit evidence of what a witness may have said on a former trial between other parties, without first asking the witness whether he had so stated, so that he might have an opportunity to explain. And if he, when so interrogated, denied the statement, then evidence that he did so state would have been properly received. But if the witness admitted that he had made the statement, there was no necessity of proving it afterwards, and his explanation should have been received for what it was worth.

But the merits of this controversy were not involved in these questions. Who were the occupants for whose use and benefit the town site of Mankato was entered, and when did their rights become vested, were the material questions in this case. The referee to whom the case was submitted found as a question of fact, that the town was not entered upon the proofs submitted March 21, 1856, but upon the proofs of occupation and settlement which were submitted on the 6th day of March, 1858, when the entry was actually made; and held in

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effect, as matter of law, that the rights of the occupants did not vest until the day the land was entered by the Judge. That the entry was for the benefit of all who were at that time in the occupancy of the lots, in proportion to their respective interests; and that up to that time, any person going upon and occupying lots not actually resided upon by others, might by such settlement and occupancy acquire a title thereto.

We, however, cannot find, in the mere fact that additional proofs were submitted on the 6th of March, 1858, at the suggestion of the local land officers, sufficient to satisfy us that the entry, then made, was allowed or approved, wholly or principally upon these new proofs. On the contrary,—in view of the fact, that the Secretary of the Interior had deliberately adjudged by the decision of December 18, 1857, that the proofs previously submitted were sufficient to authorize the entry of all the lands embraced in Judge Chatfield's application, the fact that there never had been any contest except as to fractional lot No. 3; the fact that the Register and Receiver were expressly directed to permit the entry in accordance with such final decision; the fact that although the local officers suggested additional evidence, they yet expressed their willingness to permit the entry upon the proofs already submitted and passed upon; and the fact that the department afterwards directed the lands to be patented at the same time that the patent would have been issued "had the entry been permitted on the 21st of March, 1856, the date on which the proof was submitted to the district office"—we are fully convinced that the entry was allowed and approved on the proofs originally submitted.

And as matter of law, we hold that after the final decision of December 18th, 1857, it was not in the power of any officer, by requiring or admitting new or additional proofs, or by requiring or admitting the entry to be made by any person other than Judge Chatfield, to interfere with the rights of parties as they existed under said decision. That "the rights of parties as they exist at the time of the entry," depend upon and are controlled by the rights of parties as they existed at the time that the Act of Congress was shown to have been

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complied with. That the entry, when made, related back to the time when the rights of the occupants became vested; that Judge Flandrau occupies the same relations to the beneficiaries that Judge Chatfield would have occupied had the latter entered the land in pursuance of his application; and that after the said 21st of March, 1856, no person could acquire any rights to these lands, under the Act of Congress of May 23, 1844, by mere settlement, occupancy or improvement.

The judgment of the District Court in favor of the Defendant is reversed, and judgment rendered in this Court in favor of the Plaintiff, as demanded in his complaint.

FLANDRAU, J., having been formerly connected with the controversy involving this title, as attorney, and having entered the land as trustee, took no part in the decision.

R. H. BINGHAM, Appellant, *vs.* THE BOARD OF SUPERVISORS OF WINONA COUNTY, Respondents.

APPEAL FROM THE DISTRICT COURT OF WINONA COUNTY.

An order setting aside a stipulation settling the issues to be tried, and allowing an amendment to an answer, is appealable.

Such a stipulation has, by virtue of the statute, the force of a contract, and cannot be disturbed except upon such grounds as would be sufficient to set aside any other contract between the parties. Such settlement of the issues by stipulation should have as much effect as their determination by the verdict of a jury, and the same, or as strong reasons are required to set aside such stipulation as would be required to set aside a verdict.

The mere fact, that a party by such stipulation has waived defences, which he might otherwise urge, is not sufficient ground for setting aside such stipulation. It must appear that the stipulation was obtained by fraud or collusion, accident, or surprise, or some ground of this nature, to justify the setting aside of the same.

The District Court has jurisdiction to try all actions against a county.

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The Appellant, who was Treasurer of Winona County, brought his action in the Court below, to recover certain fees and charges which he claimed to be entitled to under the statutes, for services for preparing lists of delinquent taxes, advertising and selling the lots therein described, and executing certificates of sale to the County of Winona, the purchaser at the tax sales. That the said certificates amounted to one thousand six hundred and seven, which embraced and included therein 1757 separate parcels of land; for which he claimed to be entitled to the sum of seventy-five cents for each of said certificates, and the sum of five cents for each additional parcel included in said certificates.

That the Board of Supervisors had refused to pay the demand, and claimed judgment for $1,212.75 and interest.

The Defendant appeared by one A. S. Seaton, the then County Attorney, and answered, admitting the performance of the services by the Plaintiff, as County Treasurer, as stated in the complaint, and that the number of certificates was 1607. But denied that the said certificates embraced or included therein 1757 separate parcels of land; it further denied the indebtedness claimed in the complaint, admitted an indebtedness of $88.55—"being the sum due for the making of said certificates and five cents for each additional description of land so bid off to said County." The answer further set up a counter claim of $2,583.81, for moneys had and received by Plaintiff belonging to Defendant.

The reply put in issue all the new matter alleged in the answer. On the 16th June, 1860, the parties, by their respective Attorneys of record, entered into the following stipulation:

"It is hereby stipulated and agreed, by and between the parties to the above entitled action, that all the facts alleged and charged in the Plaintiff's complaint herein, and each and every one of them be upon the trial of this cause admitted to be true by the Defendants, and that no question of law or fact shall be submitted or urged before the Court, by either party, other than that which relates to the amount of fees

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which the Plaintiff is entitled to recover under the statute regulating fees in such cases."

On the 19th of June, 1861, William H. Yale, Esq., having succeeded said Seaton as County Attorney, moved that this stipulation be set aside, and for leave to serve an amended answer. The motion was based upon the following affidavit:

"County of Winona, *ss.* William H. Yale, of the city and county of Winona, being duly sworn, says: That at the annual election held in Winona county, in the fall of 1860, this deponent was elected County Attorney for the County of Winona, and that afterwards, to-wit: on the first day of January, A. D. 1861, this deponent, having first duly qualified, entered upon the discharge of his duties and has been ever since and is now acting as County Attorney for the County of Winona.

"That by some means now unknown to this deponent, this deponent was informed that a suit had been commenced against the above named Defendant, whereupon this deponent immediately made application to A. S. Seaton, deponent's predecessor as County Attorney for Winona county, and Attorney of Record in the above entitled action for Defendant, for the pleadings and proceedings had in said action; that said Seaton repeatedly promised this deponent that he would give said papers to this deponent the next day; that this promise was repeated as many as twenty different times, on as many as twenty different days.

"And deponent further says, that he has been unable to obtain pleadings from the said Seaton, although he made repeated applications and used much diligence. That this deponent had no means of knowing and did not know the particular nature of the suit, or whether the same had ever been noticed for trial or not, or at what stage of the proceedings the same had arrived.

"And deponent further says, that on the 12th day of June, A. D. 1861, he obtained and saw for the first time copies of the pleadings from Messrs. Sargeant & Franklin, Attorneys for the Plaintiff; that the said complaint is founded upon a demand made by R. H. Bingham, against the county of Winona, for certain fees alleged by him to have accrued during the

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spring of 1859, while he, the said R. H. Bingham, was acting as Treasurer of the county of Winona, amounting in all to the sum of $1,212.75.

"And the answer to said complaint, which is in the hand writing of the said A. S. Seaton, and signed by him as Attorney for the county of Winona, admits nearly every allegation of the complaint to be true, and very imperfectly denies any at all, and in fact admits that a portion of the claim is just and legal, and does not sufficiently deny any part of the complaint.

"And deponent further says, that afterwards, to-wit: on the 16th day of June, A. D. 1860, a stipulation in the hand writing of Mr. Franklin, one of the Counsel of Plaintiff, was entered into and signed by the said A. S. Seaton, Attorney for the Defendant, stipulating away all of the defences but one, a copy of which stipulation is attached to this affidavit marked Schedule A, and made a part of this affidavit.

"And deponent further says he is informed and believes that the said claim of the Plaintiff is wholly unjust and void as against the Plaintiff. That in truth and in fact the defendant has four several and separate answers or defences to the claim of the Plaintiff:

"*First*—That the statutes did not authorize a sale at that time, from the fact that the returns of the Collectors were not made till the latter part of February, A. D. 1859.

"*Second*—That if the statutes authorized any sale to take place at that time, the same was void for the reason the same was not advertised four weeks prior to said day of sale.

"*Third*—The Plaintiff having once presented his claim to the Board of County Supervisors of Winona county, and they having finally adjudicated the same, the Plaintiff is precluded from coming into this Court with the same claim.

"*Fourth*—If the sale was authorized by statute and public notice was properly given, then and in that case the said R. H. Bingham had no right to execute but one certificate to Winona county without orders to that effect, and for that he would be entitled to only seventy-five cents for the certificate, and five cents for each additional description of land."

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Upon the argument of this motion the following affidavit of A. S. Seaton, Esq., was read:

"County of Winona, *ss.* A. S. Seaton, of the county aforesaid, being duly sworn, deposes and says, that William H. Yale, Esq., now acting Attorney for Defendants in the above entitled action, was informed of the commencement of said action, and conversed with this deponent about said suit at various times prior to his entering upon the duties of his office, and this deponent further says that when first applied to for said pleadings and proceedings by said Yale, this deponent informed him that he would find said papers on file in the office of the Auditor of said county, that this Defendant had only had them therefrom to use in his defence of said action, and then returned them to that office. And this deponent further says, that the answer in this action, drawn by this deponent and referred to in said Yale's affidavit, was so drawn after a thorough search and investigation of the records and papers of the said Defendant, and examination of the facts in the case, and the admissions therein made were based upon the facts as ascertained by said investigation; and all of which facts this deponent believes to be true.

"And this deponent further says, that the said stipulation in this case, and mentioned in said Yale's affidavit, was made by this deponent after a thorough and careful investigation of the subject matter in controversy, and from such investigation this deponent believed and still does believe, that he did not stipulate away any defence to said action, either legal or equitable, and that this deponent made such stipulation with a view solely to strip said cause of extraneous matters, and try said cause upon what said investigation convinced this deponent was the only point in said cause, and the sole defence to said action."

The Court below ordered that the stipulation be set aside, and that Defendants have leave to amend their answer.

The Plaintiff appeals from this order.

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Points and Authorities of Plaintiff in Error.

I.—The Court erred in granting the motion:

1st. At common law, where nothing more than the ordinary relation of attorney and client exists, the latter is bound, as between him and the opposite party, by every act which the former does in the ordinary course of practice, and without fraud or collusion, however injudicious that act may be. *Latuche vs. Pesherante*, 1 *Salk.*, 86; *Griffiths vs. Williams*, 1 *J.R.*, 710; 1 *Graham's Prac.*, 3*d ed.*, 236. No fraud or collu sion is pretended to exist in this case.

2d. If an attorney, by negligence, suffers judgment by default, submits to a nonsuit, withdraws the record, or confesses the action, his client is bound. So he may discontinue the action, waive a judgment by default, refer a cause, enter a *remittitur damna*, give a cognovit, or the like—may stipulate, as a condition of obtaining a continuance of a cause for the term, that the action shall not abate by the death of his client before the trial—may refer a cause to arbitrators, with an agreement that the award shall be final—may waive all informalities and irregularities—may stipulate, out of court, concerning the facts in the case, and his client is bound by all such acts and stipulations. *Lush's Prac.*, 219; *Anonymous*, 1 *Salk.*, 86 ; *Lailler vs. Smart*, 6 *Cow.*, 385; *Reinholdt vs. Alberti*, 1 *Binn.*, 485; *Pelmer vs. Delber*, 3 *Taunt.*, 486; *Lamb vs. Williams*, 1 *Salk.*, 89; *Clark vs. Gray*, 1 *How.*, *P. R.*, 128; *Ames vs. Webber*, 10 *Wend.*, 575 *and* 624; *Wilson vs. Young*, 9 *Barr*, 101, *Hanson vs. Hortt*, 14 *N. H.*, 56; *Lewis vs. Sumner*, 13 *Mich.*, 269; *Alton vs. Silmanton*, 2 *N. H.*, 520; *Part* 1, *Cow. & Hill's Note*, 3*d ed.*, 366; 1 *Graham's Prac.*, 3*d ed.*, 236.

3d. Even where an attorney appears without authority, his client is bound by his acts, and if he suffers damages in consequence thereof, he must look to the attorney. *Anonymous*, 1 *Salk.*, 86 *and* 88; *Denton vs. Noyes*, 6 *J. R.*, 296.

4th. The same is true of the authority of attorneys in Courts of Equity. *Bethel Church vs. Cormack*, 2 *Md., Ch.*

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Decis., 143; *Thornberg vs. Macauley*, 2d *Md. Ch. Decis.*, 425; *Lawson vs. Betteson*, 7 *Eng.*, 401.

5th. In this State the common law rule is declared to its fullest extent by Statute.. An attorney is authorized to bind his client in any of the proceedings in an action or special proceeding, by his agreement duly made in writing; and his agreement so made is as binding as if made by his client, or entered on the record of the court. *Comp. Statutes Minn.*, 667, *sec.* 10.

II.—In this case, the attorney, by virtue of his office, possessed all the power and authority in the premises of both attorney and client:

1st. A District Attorney in the State has the sole and exclusive power and control over, in and about all civil suits, applications, or motions in the District Court in which his county is interested as a party. *Comp. Statutes of Minn.*, 164, *sec.* 3.

The order of the Court below should be reversed.

Points and Authorities of Defendant in Error.

I.—The order appealed from is not an appealable order, therefore the appeal ought to be dismissed. *Session Laws*, 1861, *page* 133; *Howard's N. Y. Code*, *p.* 537; *Ib.*, *P. R.*, *vol.* 10, *p.* 90; *Ib.*, *P. R.*, *vol.* 21, *p.* 97; *N. Y. Court of Appeal*, *vol.* 18, *p.* 150; *Ib.*, *vol.* 11, *p.* 276; *Ib.*, *vol.* 16, *p.* 242; *Ib.*, *vol.* 21, *p.* 531; *E. D. Smith*, *N. Y. City*, *vol.* 2, *p.* 223; *Minn.*, 4, *p.* 227.

II.—Setting aside the stipulation and releasing therefrom, is nothing more than granting leave to amend the pleadings; one is involved in the other, and the leave to amend necessarily destroys the stipulation.

III.—An attorney has no right to stipulate away any valid defences which his client may have, without express authority from that client.

IV.—The affidavit on which the motion was made, is not contradicted on any material point, by the counter affidavit of A. S. Seaton; it must, therefore, be taken to be true; but even if contradicted in every material part, the Court, in its discretion, could believe what it chose, and act accordingly.

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V.—A motion to amend the pleadings at any time before trial, is proper, and in accordance with our practice, and courts will not inquire into the merits of the proposed amendments, further than to see that they are not plainly frivolous. *Stat. of Minn., p.* 544, *sec.* 94; *Howard's P. R., vol.* 11, *p.* 170; 4 *Cowan*, 555; 7 *Wisconsin*, 540.

VI.—The Court has an undoubted right to release parties from a stipulation on motion of either party, on the ground of fraud, mistake, surprise, negligence, ignorance or improvident admissions. 13 *Howard, P. R.*, 26; 19 *Ib.*, 193; 16 *Ib.* 144; 1 *Cowan*, 117; 6 *Wend.*, 515; 9 *Wend.*, 437; 32 *Barbour*, 134; 1 *Story, Eq. Jur.*, 251, 134; 1 *Hoffman's Ch. Pr.*, 28, 24; 10 *Barbour*, 547; 33 *Ib.*, 603.

VII.—The Court would release a county from the stipulation of a County Attorney, made without express authority, for less cause than they would an individual, who could be supposed to know more of what his counsel were doing.

VIII.—The Court would permit the amendment and release from the stipulation for less cause, for the reason that no harm is done the Plaintiff, nor is he in any manner prejudiced by the setting aside of the stipulation.

IX.—The stipulation is a fraud on the Defendants, for however innocently procured on the part of the Plaintiff, it takes from the Defendants two separate and complete defences in law, which, by the terms of the stipulation, they are prevented from raising.

X.—The stipulation in question is a fraud on the Defendants, for the further and conclusive reason that it essays to give jurisdiction to the Court indirectly, by stipulating that the Defendants will raise no question, either of law or fact; that it will not call in question the jurisdiction of the Court, when, in fact, the Court had no jurisdiction, and therefore could not gain it even by stipulation; for the only place where this matter could be settled, was with the Board of Supervisors of Winona county. On page 160 of the Statutes of Minnesota, the Treasurer is directed to settle his account with the Board of Commissioners. If that law was repealed by the township Act of 1858, on page 198 of the Statutes, the Treasurer is ordered to "exhibit all his books and accounts,

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and all vouchers relating to the same, to be credited, and on page 154, power is given to the Board of Commissioners to examine and settle all accounts of the receipts and expenditures of the county, and on page 194, of the Statutes, power is given to the Board of Supervisors, to credit all accounts chargeable against their county, and to direct the raising of such sums as may be necessary to defray the same; and to audit means to examine, settle and adjust, or, in other words, to determine how much, if any is due from the county; and the decision of the Board of Supervisors was final in such matters, prior to the passage of the law of 1852, which gives the right to appeal from the decisions of the Board of Supervisors, unless it was a claim that you could compel the Board to pay by mandamus.

In this cause the remedy of the Plaintiff was to either appeal from the decision of the Board of Supervisors, or (the amount which the Plaintiff claims, being for a statutory fee easily computable,) to have compelled the Board by mandamus. If the county can be sued in a matter of this kind, it opens the door for thousands of vexatious suits which the framers of our laws never intended should occur. 20 *Barb.*, 294; 2 *Sanford*, 460; 6 *Seldon*; 260; 18 *Johnson*, 242; 9 *Wen.* 508; 10 *Wend.*, 363.

Sargeant & Franklin, Counsel for Appellant.

Wm. H. Yale, Counsel for Respondent.

By the Court.—Atwater, J.—The authority of an attorney to bind his client, as defined by *s.* 10, *p.* 667, *Comp. Stats.*, extends to "any of the proceedings in an action or special proceeding duly made, or entered upon the minutes of the court." This provision is sufficiently broad to cover a stipulation of the kind here presented, and it is binding upon the client, until he is relieved therefrom, by proper order of the Court, or due course of law.

The Counsel for the Respondent claims that the order is not appealable, on the ground that setting aside the stipulation and releasing therefrom, is nothing more than granting leave

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to amend the pleadings; that one is involved in the other, and the leave to amend necessarily destroys the stipulation. In this position the Counsel we think is mistaken. The stipulation is, in substance, a settlement of the issues to be tried. The parties have a perfect right to make such an agreement, and having made it, it has, by virtue of the Statute, all the binding force of any other contract, and is not to be disturbed except upon such grounds as would be sufficient to set aside any other contract between the parties. At least I think this settlement of the issues by stipulation, should have as much effect as their determination by the verdict of a jury, and that it should require the same, or as strong reasons to set the stipulation aside, as would be required to set aside a verdict. The setting aside this stipulation, is much more than simply allowing an amendment of the pleadings. To regulate the form of the issues, strike out irrelevant or improper matters, or allow additional allegations, where the parties have made no agreement respecting the same, may properly be considered matters within the discretion of the Court, and its order thereon not the subject of appeal. In such case it is understood that the parties arrange the pleadings and settle the issues with the aid of the Court, in case of disagreement between them. But when the parties, upon full deliberation and consideration, have formally agreed, in writing, that such and such and no other, shall be the issue, a court has no right to annul the agreement, on the suggestion or proof that the party has waived rights that might be advantageous to him. The parties are in a different position with regard to their respective rights, from what they would have been, had they left their issues entirely for the Court to determine. As the stipulation has been set aside, we think the order appealable.

It remains, therefore, to consider whether there was any sufficient cause shown for setting aside this stipulation. The only evidence upon which the Court acted, so far as appears from the case, were the affidavits of Yale and Seaton, which appear in the return. The affidavit of W. H. Yale, Esq., the acting County Attorney, sets forth all the facts upon which the Defendant grounds his claim for relief. That states in substance, that the answer interposed by Seaton, the former

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County Attorney, admits nearly every allegation of the complaint to be true, and very imperfectly denies any at all; and that "a stipulation, in the handwriting of Mr. Franklin, one of the counsel for the Plaintiff, was entered into and signed by the said A. S. Seaton, attorney for the Defendant, stipulating away all the defences but one. That in truth and in fact the Defendant has four several and separate answers or defences to the claim of the Plaintiff," setting forth the substance of the same.

There is no allegation that any fraud was practised upon the Defendants or their attorney, by which the latter was induced to sign the stipulation, nor of any collusion between the attorney and Plaintiff. No mistake, accident, or surprise is asserted, nor that the attorney was not fully aware of all the defences of which his client could avail himself, and of the nature and effect of his stipulation. And even any presumption that such matter exists in justification or excuse, is rebutted by the affidavit of A. S. Seaton, Esq., who states, "that the said stipulation in this case, and mentioned in said Yale's affidavit, was made by this deponent after a thorough and careful investigation of the subject matter in controversy, and from such investigation this deponent believed, and still does believe, that he did not stipulate away any defence to said action, either legal or equitable," &c. And indeed, it nowhere appears, that the Defendant did not have full notice of the action of his Attorney in the premises, and did not consent thereto; and in the absence of any evidence to the contrary, it must be presumed that such was the case, as in the management of a cause, an Attorney is presumed to be acting under the authority and by the direction of his client.

Upon the facts here presented therefore, we see no ground whatever, upon which the Court could properly interfere to set aside this stipulation. Even had fraud been alleged against the County Attorney, and collusion between him and the Plaintiff, whereby the Defendant was prejudiced, it is extremely questionable whether the relief asked would be granted, without showing the insolvency of the Attorney. (6 *John.*, 296; 6 *Wen.*, 514; 9 *Wen.*, 437; *Id.*, 499; 1 *Binn.*, 214; 10 *Barb.*, 547.) If the Defendant has in fact the de-

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fences set up in his amended answer, it would seem that he has made an improvident agreement in waiving them; but that circumstance alone, is not sufficient ground for relieving a party from the consequences of his own voluntary act. Such disregard of the binding force of obligations is not to be regarded with favor, nor would it be consonant with sound reason and established precedents, that it should receive the deliberate sanction of a Court of Justice.

The Respondent claims that the Court had no jurisdiction over this case, and that jurisdiction could not be given by stipulation where it had none originally. In the latter part of the proposition he is correct, and it becomes therefore necessary to inquire, whether aside from the stipulation the Court could entertain a suit of this nature, and had jurisdiction to adjudicate upon a claim of this kind.

The counsel cites in support of his proposition, *Sec.* 6, *p.* 198, *Comp. Stat.*, which provides that "at the annual meeting of the Board of Supervisors, or such other times as they shall direct, the County Treasurer shall exhibit to them all his books and accounts, and all vouchers relating to the same, to be credited and allowed." Also *Sub.* 5, § 13, *Comp. Stat.*, *p.* 154, *and Sub.* 2, § 4, *Comp. Stat.*, *p.* 194. As to whether these provisions of statute oust the District Court of jurisdiction of an action of this kind, it is unnecessary now to inquire, since they are all repealed by *Chap.* 3 *and* 15 *of the Session Laws of* 1860. *Chap.* 15, *p.* 131, *Sess. Laws* 1860, defines the powers and duties of County Commissioners; and their authority with regard to settling claims, is prescribed in *Sec.* 23 of said chapter, which provides that the Board of Commissioners shall have full power to examine and settle all accounts of the receipts and expenditures of the county, and shall have the care of the county property and the management of the county funds and business, except in cases otherwise provided for, but shall exercise no other powers than such as are given by law." The counsel for the Respondent relies strongly (among others,) upon the cases in New York, citing 20 *Barb.*, 294, 2 *Sand.*, 460, and 6 *Sel.*, 260. The statute of that State upon which these decisions were based, reads as follows, viz.: "to examine, settle and allow all accounts chargeable against

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such county; and to direct the raising of such sums as may be necessary to defray the same." 1 *N. Y. Rev. Stat., p.* 675, *Sub.* 2, *Sec.* 2, *4th Ed.* And by *Sec.* 23, *p.* 680, "every chairman shall have power to administer an oath to any person, concerning any matter submitted to the Board, or connected with their powers or duties." The difference between the two statutes is manifest, that of New York being much broader than our own. And we find no provision at all in our statute, authorizing the chairman or any member of the Board to administer an oath, without which it is manifest, the examination of accounts must be often extremely unsatisfactory, and without which indeed, it must frequently occur that no just settlement could be made.

But again, we find it provided in *Sec.* 8, *p.* 132, *Sess. Laws* 1860, that "all actions, local or transitory, against any county may be commenced and prosecuted to final judgment in the District Court of the county against which the action is brought." And in *Sec.* 7, *p.* 136, of the same act, in which the powers and duties of the Commissioners are defined, it is provided that they may, "in like manner, by and under their name of office, be sued by any person or persons having any manner of claims against such county." We find no such provisions in the New York statute, and indeed, it differs in other respects than those above quoted, very widely from our own, with reference to the powers and duty of County Commissioners. The provisions above quoted from the law of 1860, are so clear and explicit, that we think no doubt can be entertained but that the Legislature intended that the District Court should have jurisdiction of actions, such as the one at bar, and indeed of any claims that may arise against the County. The policy of such a law may well be questioned, but with that, Courts have nothing to do.

We think the Court below erred in setting aside the stipulation, and granting leave to amend, and the order must be reversed.

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JOHN M. CASTNER, Appellant, *vs.* HENRY ECHARD, Respondent.

APPEAL FROM THE DISTRICT COURT OF STEELE COUNTY.

By the Court—EMMETT, C. J.—For the opinion in this case, see that filed in the case of *Castner vs. Gunther* heard and determined at this term—the two cases having been heard and determined together upon the same questions of law and substantially the same facts. (*Ante, p.* 119.)

JOHN M. CASTNER, Appellant, *vs.* JAMES A. LOWRY, Resp't.

APPEAL FROM THE DISTRICT COURT OF STEELE COUNTY.

By the Court—EMMETT, C. J.—The material questions of law and fact are the same in this, as in the case of *John M. Castner vs. Jacob G. Gunther*, heard and decided at the present term. And as the two were argued, submitted and considered together, the opinion filed in *Castner vs. Gunther* was intended to apply to this case also. (*Ante, p.* 119.)

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THE SOUTHERN MINNESOTA RAILROAD COMPANY, Appellant, *vs.* THOMAS B. STODDARD, Respondent,

APPEAL FROM THE DISTRICT COURT OF HOUSTON COUNTY.

All railroad charters that do not directly express the contrary, must be taken to allow the exercise of such a discretion in the location of the route as is incident to an ordinary practical survey, made with reference to the nature of the country to be passed over, and the obstacles to be encountered or avoided, not deviating substantially from the course and direction indicated by the charter.

Since the organization of the State government, the District Courts are Courts of general jurisdiction, and may entertain all cases jurisdiction of which is not conferred upon some other Court by the Constitution, or some Statute. The case of *Castner & Hinkley vs. Chandler & Green*, 2 *M. R.*, 86. was decided under the Territorial government, and is not authority since the Constitution. See *Agin vs. Heyward, ante*, p. 110.

The above named Respondent brought this action in the District Court for Houston County, to restrain the Appellant by injunction, from building and operating a railroad across his lands lying situate in Township No. 104, N. of R. 4 W., in county of Houston, which lands are described in complaint as follows, to wit: S.E. quarter of sec. 22, and W. half of N. E. quarter of the same section, town and range aforesaid, except twenty acres out of the N.E. corner of last-mentioned tract.

It is alleged in the complaint, that before and at the time of the committing of the several grievances complained of therein, Respondent was a citizen of the United States of America, then residing in the State of Wisconsin; that he was seized in fee of said lands; that Appellant was a body politic and corporate, created by and under a certain Legislative act, to wit:

"An Act to Incorporate the Root River Valley and Southern Minnesota Railroad Company," approved March 2, 1855. That it was organized under said act, and known and described by said name and style aforesaid, until its name and description was changed by statute law, approved May 23d, 1857, to that of "Southern Minnesota Railroad Company,"

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by which it was thereafter, and at the time of the commencement of this action, known and described in law.

That by the name and style aforesaid, under the aforesaid act of incorporation, and two subsequent acts amendatory thereof, approved respectively February 27th, 1857, and May 23d, 1857, said corporation, (this appellant,) among other things, was authorized and empowered by law to survey, locate and construct, &c., certain railroads, specified in said act of incorporation and amendment, from the village of Hokah, in said Houston county, as the eastern terminus, westwardly, by the most feasible and practicable route, and at its pleasure to alter the line thereof, without changing the said eastern terminus, and with the privilege of a branch, "starting from (said village of) Hokah, and running up the west bank of the Mississippi river, by the way of Target Lake, to La Crescent, in Houston county."

But not with the privilege of a branch starting from Hokah, and running to La Crescent by any other route than that, *i.e.*, starting from "Hokah and running up the west bank of the Mississippi river, by the way of Target Lake, to La Crescent."

That up to the time of commencement of this action, appellant had wholly neglected to construct any part or portion of the main track from Hokah, westerly, but had since its organization, and before the commencement of this action, commenced the construction of the said branch route, and committed the grievances mentioned in said complaint, and in the manner there stated, to wit: had not located it from Hokah up the west bank of the Mississippi river, by the way of Target Lake, as required by acts of incorporation and acts amendatory thereof; and on the contrary had located and commenced the work for the construction thereof on a route at least one and one-half miles westerly of said west bank, and then were constructing the same at least three-fourths of a mile on and across the Respondent's said land. That the actings and doings of said Defendant in the location and struction of said road there, over said land, consisted in divers acts of grading, by digging and removing of earth there on said land, and all this contrary to law, and against

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the will and without the license or consent of Plaintiff. And that, thereof Defendant had due notice.

That Defendant did declare it to be its plan, purpose and intention immediately to proceed with said work on said land, to completion of the grade for said branch road there, as and for a permanent work there, and on completion of said grade to lay and put down permanently thereon a railway track of iron rails, and use the same as railroad track or way for running divers locomotive engines, cars, &c., to be propelled on and along over the said track by steam.

That said Plaintiff believed, &c., unless restrained by injunction, Defendant would carry its plan and purpose into execution; and if it did it would be a permanent private nuisance to him (said Plaintiff,) especially injurious, and render his said lands nearly valueless to him.

The first defence set up in answer is in these words: "That in the location or commencement of construction of the branch track, of the main track of this road, alleged in the complaint, or any part thereof, they have not done, or do not design or intend to vary or change the route thereof to any other than from Hokah, and running up the west bank of the Mississippi river, by way of Target Lake to La Crescent."

"And they aver and state that the said location and commencement of construction of said branch track, for which complaint is made by the said Plaintiff in this action, are where the said branch passes on and over the land of the Plaintiff, as stated in said complaint, and elsewhere through its entire length, on the said route from Hokah, "and running up the west bank of the Mississippi river by the way of Target Lake to La Crescent," as allowed by the said several acts of the Legislature referred to in said complaint, and not elsewhere."

"And Defendant denies that the location, completion and running of said branch road as the Defendant is designing and intending to do, will cause the said work to be a private nuisance, as alleged in the complaint or otherwise. But, on the contrary, the same will be a public work, carefully and properly constructed and operated as by law, the Defendant

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is authorized and empowered to do, under and by virtue of the said several acts of the Legislature," which said location, commencement of construction, and intended completion and operation of the said branch road are and will be the same and no other, as the alleged wrong and injuries stated in the complaint.

Points and Authorities for Appellants.

I.—The complaint does not state facts sufficient to constitute a cause of action.

a It fails to show the amount in controversy to exceed $100, and therefore, that the District Court had jurisdiction of the matter. *Constitution, art.* 6, *sec.* 5; 2 *Minn.*, 86.

b The complaint does not even attempt to show any necessity for a resort to the extraordinary remedy by injunction, "for the furtherance of justice, and the protection of the Plaintiff's rights," as is requisite, to warrant the exercise of that power. *Bruce vs. Delaware and Hudson Canal Co.*, 19 *Barb.*, 378–9. "When the remedy at law is adequate, Courts of Equity will not interpose by injunction." *Willard's Eq.*, 357; *Adams' Eq.*, 453, (194); *Ib.*, 478, (207.) The damages must be irreparable, and the law furnish no adequate remedy, *ib.* 481, and notes citing *Cutting vs. Carter*, 4 *Hen. and Mumf.*, 424; *Poindexter vs. Henderson, Walker's Rep.*, 176; *Atkins vs. Chilson*, 7 *Met.*, 398; *Spooner vs. McConnell*, 1 *McLean*, 338.

II.—The entire case, including the pleadings and proofs, shows conclusively, that no wrong has been committed, or threatened, on the part of the Appellant, and that the judgment restraining the company from the lawful prosecution of their business, in building and operating the road, was erroneous, and should be reversed.

The answer discloses, in the second defence, what we deem the rights of the company, under these acts, and the action of the company under them. The company accepted the provisions of this act. The evidence fully sustains these allegations.

1. Under the act of May 22, 1857, the company have a

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right to build, and are building, the New Railroad, thereby authorized to be built, "from La Crescent via Target Lake, up the Valley of the Root River," etc. No material variation is averred, or shown, in not passing by the way of Target Lake.

2. Under the other acts referred to, the company have a right to build, and are building the old railroad authorized by their original act of incorporation, as amended, from La Crescent to Hokah, etc., by the most feasible and practicable route.

3. Coinciding as the two roads do, from La Crescent as far up the Root River valley as Hokah, the company build both as one road.

c Though as a general principle of law, it is true that corporate powers are to be strictly construed, as against the corporation, the authorities are equally conclusive, that with a grant of power, all incidents necessary to make the power effectual are also granted. *Angel & Ames on Corporations*, 3; 2 *Kent*, 298; 5 *Conn. Rep.*, 232; *Mohawk Bridge Co. vs. U. & S. R. R. Co.*, 6 *Paige*, 554, and cases there cited. Also, 4 *Wheat.*, 636; 2 *Min.*, 20.

Points and Authorities for Respondent.

I.—Plats of surveys of public lands certified by the Register of the Land office of the District in which such land is situated, to be a correct copy of the certified copy on file in his office, of the original plat of such surveys, entitles such certified copy to be read and used in evidence in the courts of this State. *Stat. of Min.*, 687, *sec.* 90; *U. S. vs. Breward*, 16 *Peters*, 143; *2d American Chancery Digest*, 571, *sec.* 53, they have accorded to them the force and character of a deposition.

II.—The act of incorporation, and resolution of acceptance thereof by the R. R. V. & S. M. R. R. Co., and acts amendatory of the act of incorporation, locate the branch of the S. M. R. R., "starting from Hokah and running up the west bank of the Mississippi river by way of Target Lake, to La Crescent, in Houston county, in the Territory of Minnesota," and where the language used in framing a statute is unambiguous, and the intention of the lawgivers apparent without the

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aid of extrinsic and explanatory matter, the language used is to be first considered as being the best evidence of what that intention is. Courts will expound the language according to the common sense and ordinary meaning of the words, and will look at the whole act, and if they find in any particular clause an expression not so large and extensive in its import as those used in other parts of the same statute, if upon a view of the whole act they can collect from the more large and extensive expression used in the other parts the real intention of the Legislature, it is their duty to give effect to the larger expression. *Act of incorporation, approved March* 2, 1855, *sec.* 2; *Resolution of acceptance by R. R. V. & S. M. R. R. Co., July 4th,* 1855; *Amendment of act of incorporation, approved Feb.* 27, 1857, *sec.* 1; *Amendment of act of incorporation, approved May* 23, 1857, *sec.* 1 *and* 2; *Same location required by grant of lands to the Territory of Minnesota, approved March 3d,* 1857, *sec.* 1; *Act to accept the grant, &c., approved May* 19, 1857; *Act to execute trust created by land grant, approved May* 22, 1857, *chap.* 3, *sec.* 1, 2 *and* 3; *Resolution of acceptance of grant by R. R. V. & S. M. R. R. Co.; Min. and Pacific R. R. Co. vs. Sibley,* 2 *Min. R.,* 13; 7 *Mass.,* 526; *Mason vs. Finch,* 2 *Scam.,* 223; *U. S. Digest, vol.* 5, 809, *sec.* 60; *Croswell vs. Van Buren and Crane,* 7 *Barb. Sup. Court R.,* 191; *Walford on Railways,* 65.

III.—Statutes incorporating companies conferring privileges and professing to give the public certain advantages in return, are to be construed strictly against the corporation, and literally in favor of the public and individuals. *Parker vs. Great Western Railway Co.,* 7 *M. & Gra.,* 263; *Grant on Corporations,* 319, 300; *The Mohawk Bridge Co. vs. The Utica & Schenectady R. R. Co.,* 6 *Paige,* 554; *The Proprietor of the Charles River Bridge vs. The Proprietors of Warren Bridge, et. als.,* 11 *Peters,* 420; *Perrine vs. Chesepeake & Delaware Canal Co.,* 9 *How. Sup. Ct. R.,* 172; *Walford on Railways,* 62, *paragraph* 465.

IV.—Courts of Equity will interfere by injunction to prevent the abuse of the powers granted a corporation, when exercised to the injury of individuals, so as to prevent rights of possession, and property being injured, obstructed or taken

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away illegally, by a railroad company. *Coates vs. the Clarence Railway Co.*, 1 *Russ. and Mylne*, 181; *Bonaparte vs. Camden and Amboy Railroad Co.*, 1 *Bald. Cir. R.*, 231; 2d *Story's Eq. Jur.*, 258, *and Note* 3 *and* 259; *Adams' Eq.*, 485, 486; *Stat. of Min.*, 596, *sec.* 15; *Bedford on Railways*, 474; *Moorhead vs. Little Miama Railway*, 17 *Ohio*, 340.

V.—The complaint on its face states facts sufficient to constitute a cause of action. *Stat. of Min.*, 596, *sec.* 15.

VI.—Respondent submits that when (as in this case) rights of property depend on construction of statutes, the following inflexible rules for construing the same must apply, to wit:

First.—That every Statute derogatory to the rights of property, or that takes away the estate of a citizen ought to be construed strictly. *See Vanhorn's Lessee vs. Dorrance*, 2d *Dall.*, 316; *Paine vs. Ely, et al., Chipman's Reps.*, 14; *Wales vs. Stetson*, 2 *Mass.*, 143; *Canal Co. vs. Railroad Co.*, 4 *Gill and Johns*, 1; 14 *Mass.*, 88.

Second.—Technical rules of construction are not to govern, unless such be the manifest meaning of the Legislature, which meaning is to be gleaned from the Legislative acts, by reference to the subject treated of therein, or to be effected thereby, as well as the language employed in the acts. *See Whiting vs. Whiting* 14*th Mass.* 88; *S. P. Bank of America vs. Fitzsimons*, 3 *Binn.*, 356; *State vs. Boyd*, 2d *Gill. & Johns*, 365.

Third.—The Legislature is intended to mean what they have plainly expressed, (as in this case,) and the safe rule is to abide by the words the law maker has used, then there is no room left for construction. *See Fisher vs. Blight*, 2 *Cranch, U. S. Reports*, 358; *Canal Co. vs. Railroad Co.*, 4*th Gill & Johns.*, 1; *United States vs. Bright et al., Wharton's Digest*, 708.

Berry & Waterman, Counsel for Appellant.

Lyndes & Losey, and E. Fox Cook, Counsel for Resp't.

By the Court—Flandrau, J.—The District Courts of this State are courts of general jurisdiction, and may entertain all

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cases, jurisdiction over which is not conferred upon some other courts by the constitution or some statute of the State. The case of *Castner & Hinkley vs. Chandler & Green*, 2 *M.* R., 86, was decided under the Territorial government, and is not authority since the State organization. See *Agin vs. Heyward*, *ante*, *p.* 110.

The Defendant by its charter was authorized to "survey, locate, construct, maintain, use and operate, and at their pleasure to alter the line thereof without changing the eastern terminus, a railroad with one or more tracks or lines of rail, from the village of Hokah in the county of Houston and Territory of Minnesota, westwardly by the most feasible and practicable route, to some point between the southern line of this Territory and the point where the township line between township one hundred and ten, and township one hundred and eleven crosses the Minnesota River, thence westwardly by the most direct and practicable route to the great bend of the Missouri River, with the privilege of a branch starting from Hokah and running up the west bank of the Mississippi River by the way of Target Lake to La Crescent in Houston county in the Territory of Minnesota, and also with the privilege of a branch railroad from Hokah, and running by the most direct and feasible route to some point in the village of Brownsville in the county of Houston and Territory of Minnesota, also with the privilege of a branch Railroad with one or more tracks or lines of rail from some point on the main road east of range twelve west of the fifth principal meridian westwardly through the counties of Mower, Freeborn and Faribault to the west line of the Territory." *Sess. Laws of* 1855, *Ch.* 24, *sec.* 2, *as amended by laws of* 1857; *1st Sess. Ch.* 37, *sec.* 1; *2d Sess. Chap.* 65, § 2.

It will be seen that the main line could be altered at the pleasure of the company except the eastern terminus, and was to be built upon the most "feasible and practicable route" between the two first points designated, and by the most "direct and practicable route," thence to the western terminus. That the branch from Hokah to some point in the village of Brownsville was to be upon the most "direct and feasible route." That the branch from some point on the

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main road east of range twelve, to the west line of the territory, was only restricted to passing through certain designated counties, which would leave a wide discretion as to the route with the company. The branch from Hokah to La Crescent, however, is directed by the charter to "run up the west bank of the Mississippi River by the way of Target Lake," no discretion being directly conferred upon the company in reference to the route of this branch.

Target Lake lies in a bottom or low area of land between the bluffs and the bank of the river; this whole bottom is subject to overflow at certain seasons of the year, when the lake is lost in the common waters of the river. The eastern extremity of the lake is less than a quarter of a mile from the west bank of the river at low water, and its western extremity less than one mile from such bank. Now there is nothing in the charter that indicates which side of this lake the branch road is to run, whether east or west, except the fact that the west bank of the river is mentioned before the lake in the order of points on the line of the road. The words are "up the west bank of the Mississippi River by the way of Target Lake." If this circumstance should be held to mean that the road should touch the west bank of the River before it reached the Lake it would carry it on the east side of the latter. We do not think such a construction can be insisted upon. These points or monuments are mentioned to control the general direction of the road, and cannot be materially departed from, and must be substantially followed, but who can say exactly how near to Target Lake or the west bank of the river the legislature designed the road should run. The very nature of the objects designated, the one a lake, and the other the ever changing bank of a running river, necessarily permit the exercise of some discretion in the location of the route. It cannot be contended that the bank of the lake was to be touched, any more than that the road should pass through its center; nor can any precise distance be stated from the bank of the river as the course of the road. There must, in all cases of the construction of railroads be a survey made of the route, unless the Legislature should be guilty of the absurdity of indicating an im-

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mutable course, to be followed without regard to the topography of the country or the interests of the road and the public. The object of the survey is to carry out the main idea of the Legislature, consulting, at the same time, the interests of the corporation and the public. If there is a mountain in the direct road, they may go round it, if tunnelling it would be impracticable, by reason of expense, time, or any of the many circumstances that would influence an engineer in making up his judgment. If a river intervenes, the best point for a bridge may be sought, always of course observing substantially the true course. We think all railroad charters that do not directly express the contrary, must be taken to allow the exercise of such a discretion in the location of the route, as is incident to an ordinary practical survey of the same, made with reference to the nature of the country to be passed over, and the obstacles to be encountered or avoided.

The company, in this case, started from Hokah, and passed along the foot of the Mississippi bluffs, running within about three-quarters of a mile of the western extremity of Target Lake, and in the general line of the west bank of the river about one and a-half miles from such bank as it is at low water, and on the bank as it is at high water, to La Crescent. All the land between the road, as located, and the channel of the river, is shown to be subject to annual, and sometimes more frequent inundations; to be of a soft, oozy nature, which would require the road to be bridged the entire length, and that the road is located as near the river as it could be, and avoid these difficulties. It is our opinion that the corporation did not substantially violate their charter in this respect. That the evidence shows that the road is on the only practicable bank of the river for railroad purposes, and by the way of Target Lake, within the meaning of the charter.

The judgment of the District Court is reversed, and the complaint of the Plaintiff dismissed.

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WILLIAM R. DIXON, Appellant, *vs.* JAMES H. MERRITT, *et als.*, Respondents.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

Where a question of fact has been submitted to a Court or jury, and evidence touching the same has been received on the part of both Plaintiff and Defendant, the finding will not be disturbed on the ground that it is contrary to the weight of evidence, nor unless it is manifestly contrary to the evidence.

Among the findings of fact by the Court were, that B, for a valuable consideration, duly assigned and transferred to Defendants a certain note and mortgage. And that such assignment was executed as collateral security for a note and mortgage executed and delivered by Plaintiff to Defendants. *Held*, that these findings were not inconsistent with each other.

Where evidence has been received in the Court below without objection, it is too late to raise the question of its admissibility in this Court.

The facts are stated in the opinion of the Court.

Points and authorities of Appellant.

I.—The finding of the facts by the said Judge in his said decision is not justified by the evidence.

II.—The finding of facts in the said decision is inconsistent and contradictory.

III.—The evidence introduced by Defendants to prove that Bidwell assigned the note and mortgage of Agnew, to Defendants, as collateral security for Plaintiff's mortgage, to-wit: the instrument of assignment under seal, executed by said Bidwell, does not sustain that allegation in their answer, in that the said instrument is an absolute and unconditional sale and transfer of the note and mortgage to Defendants, for the sum of $1,080.

VI.—The Defendants cannot contradict the written evidence under seal, of their own transaction, without alleging accident, fraud or mistake, especially where, with a knowledge of all the facts of said transaction they have acted under the said written instrument according to its legal tenor, and enjoyed the rights flowing from it, according to its *prima facie*

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import. 12 *Ala.*, 229; 12 *Smedes & Marshall's Miss.*, 608; 8 *Blackf.*, 237; 8 *Barb. Sup. Ct.*, 585; 16 *Barb.*, 439.

V.—The conclusions of law of said Judge in his said decision, are error against law.

VI.—The evidence establishes facts essentially and materially different from those found by the said Judge in the said decision.

VII.—Parol evidence is admissible for the purpose of proving that Plaintiff was the surety of Agnew in said transaction, and that Defendants had knowledge of such relation existing, notwithstanding the written instrument executed by Plaintiff. 21 *Pick.*, 195 *and* 197; 6 *Hammond*, 17; 9 *Metc.*, 511, 517; 4 *Humph.*, 292; 5 *Denio*, 509; 17 *Conn.*, 201; 9 *Miss.*, 125; 10 *Smedes & Marsh*, 527; 4 *N. H.*, 221;

VIII.—The evidence shows that Plaintiff occupied the relation of a surety merely, of Agnew, for the payment of his note to Bidwell, after its transfer with accompanying security, to Defendants. He is therefore entitled *strictissimi juris* to all the rights and remedies incident to that relation. 1 *Gilman*, 581; 10 *Johns.*, 180; 2 *Penn.*, 27; 1 *Branch*, 327; 1 *La. Ann.*, 62.

IX.—It is averred by Plaintiff in his complaint (folio 11 and 12,) and admitted by Defendants in their answer (folio 19 and 20), and is agreed upon in the "case" (folio 31) that the four notes to Defendants were made by both Agnew and Plaintiff. This fact taken in connection with the evidence proves Plaintiff to have been a surety for Agnew.

X.—The surety is entitled to all the rights, remedies and benefits, against his principal, to which the creditor or obligee is entitled, and to no more. The surety, after payment of the debt of his principal, can collect of him the amount which the creditor or obligee could collect, and no more.

XI.—The obligation of the Plaintiff being collateral, he is legally bound for the sum actually collectable by process of Court, on the instrument, for the payment of which he binds himself as surety.

XII.—The facts found by the said Judge warrant the conclusion of law, that Plaintiff was merely the surety of Agnew for the payment of the note, which Defendants purchased

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from Bidwell. *Theobald on Principal and Surety* 3, 114, 115; 3 *Kelly*, 239, 405; 13 *Smedes & Marsh*, 122.

XIII.—Defendants having purchased the note and mortgage subject to any decision of the Courts upon the right to collect the 5 per cent. per month interest after due, cannot, if the decision be against the right to collect the same, hold Plaintiff for what the law does not hold him. All that the Courts would have compelled Plaintiff to pay, was the principal, $600, with interest thereon at 2 1-2 per cent. per month till due, and 7 per cent. per annum thereafter, amounting to the total sum of $862, due at the date of the sale of the mortgaged premises of Agnew. The excess of money which Defendants paid for the note and mortgage over the legal rate of interest as settled by the decision of the Supreme Court, must be regarded as money paid under mistake of law, and cannot therefore be collected. 12 *Pick.*, 399; 3 *Kelly*, 162; 2 *Texas*, 501.

XIV.—Unless the transaction is considered a sale of the note and Mortgage to Defendants by Bidwell, they had no right to said note and mortgage. If the money borrowed from Defendants, as alleged, paid the debt to Bidwell, he could not assign the same, for there was nothing to assign—the debt was extinguished, and even if it was not, there was no consideration moving from any of the parties to the transaction, to Bidwell, sufficient to support an assignment of the said debt and security. 2 *McLean*, 451; 3 *ib.*, 587; 4 *Barr.*, 248; 9 *Miss.*, 280; 1 *Story's Eq. Jurisp.*, *sec.* 499 *b*, 499 *c*.

Points and Authorities of Respondent.

I.—The testimony shows that the Appellant's mortgage was given for $1100 borrowed of Respondents and received by Appellant, and that only $1000 has been paid, which was paid by the foreclosure of Bidwell's mortgage against Agnew and wife, leaving the mortgage still subsisting as a lien on the lands mortgaged.

II.—The Bidwell mortgage was assigned to Respondents by direction of Appellant for the purpose of payment so far as it would go, and whether it was called further security or col-

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lateral can make no difference. The Bidwell mortgage could not be collateral over $1000.

III.—There was no fraud or imposition practiced in procuring the mortgage.

AUGUSTUS R. CAPEHART, Counsel for Appellant.

NEWELL, Counsel for Respondents.

By the Court—ATWATER, J.—This action was brought by the Plaintiff Dixon to cancel certain notes and a mortgage given to secure the same, to the Respondents. The complaint alleges that in 1855, one Edward C. Agnew and Eliza his wife made and delivered to Ira Bidwell, a mortgage on certain premises in Dakota County, as security for the note of Agnew for $600, due in two years from date, with interest at two and a half per cent. per month. That the first year's interest, ($180,) was paid on the same. That on the 4th day of May, 1858, said Bidwell for a valuable consideration, duly assigned said mortgage to the Defendants, together with the note secured thereby. That the Defendants foreclosed the same in due form by advertisement, and on the 22d day of August, 1859, bid in the premises for the sum of one thousand dollars. That the amount actually due at the time of such sale was $862, and that the costs of such sale did not exceed thirty dollars. That on said 4th day of May, 1858, the Plaintiff entered into a contract with Defendants, through their agent, David Merritt, but without any consideration, that he would mortgage certain land in Ramsey county, for the purpose of securing to the Defendants the payment of any deficit that might remain, after the foreclosure of the premises mortgaged by Agnew aforesaid. That the Plaintiff being ignorant of the manner of writing out and expressing the aforesaid agreement, entrusted the preparation of the papers to said David Merritt, who procured a mortgage to be drawn, purporting in its terms that the Plaintiff had granted and sold the lands described therein, to Defendants, for the sum of $1100, and conditioned to be void upon payment of four promissory notes, amounting in the aggregate to said sum, said notes being signed by Plaintiff and said Agnew.

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That said David Merritt, as the agent of the Defendants, wilfully, falsely, and fraudulently concealed the true nature of said mortgage, and represented to Plaintiff that the execution and signing the promissory notes, was nothing more than the proper, written and legal form of the agreement which he had made with said Merritt, and that trusting to the said Merritt, and believing said representatation to be true, he signed said notes, and executed said mortgage without reading, or having read to him the same, and without receiving any consideration therefor. That said mortgage was duly recorded on the day of the date of its execution and delivery, and remains unsatisfied and uncancelled of record, and is a cloud upon the title of plaintiff, and that the notes remain in defendants' possession.

The answer admits the execution, delivery and foreclosure of the Bidwell mortgage, but denies that the mortgage to defendants was given for the purpose mentioned and alleges that the mortgage was given to secure the sum of eleven hundred dollars loaned to Agnew at plaintiff's request, and that the mortgage to Bidwell was assigned by Bidwell to defendants at the request of Plaintiff and Agnew, as collateral security for the payment of the said $1,100 and without any consideration from defendants to Bidwell.

A jury trial was waived, and the cause was tried by the Court, who adjudged that the action be dismissed. A motion for a new trial was made and denied, from which order Plaintiff appealed.

The first objection urged by the Appellant, is that the finding of the Court upon the facts was contrary to evidence. A number of witnesses were examined on both sides, and the testimony was somewhat conflicting. Some of the witnesses for Plaintiff testified to facts, tending to prove that the mortgage of Plaintiff was given as collateral security only for that from Agnew to Bidwell; while some of the Defendant's witnesses swear positively the loan was made directly to Agnew, at Plaintiff's request. Without quoting the evidence at large, it may be stated it was peculiarly of that nature which renders a court or jury the appropriate tribunal to pass upon the same; and this Court cannot disturb the finding on the ground

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that it is against the weight of evidence, nor unless it is plainly contrary to the evidence. From an examination of the evidence presented by the case, we cannot conclude that the finding of the Court, on the main facts in issue, is contrary to the evidence, or even against the weight of evidence. The Plaintiff charged that he had been induced to sign his mortgage, and the notes, through fraudulent representations of the agent of the Defendants. The charge in the complaint is informal, and not expressed with the fulness and certainty desirable in pleading a fact of that nature; and it is very questionable whether the complaint upon demurrer could have been sustained. The Plaintiff avers he did not read the mortgage or hear it read, but does not state that he could not read, nor even that he did not know the contents of the mortgage; and if he has been imposed upon at all, it would seem to be only the result of his own negligence, and of such negligence and carelessness as furnishes no strong ground of interference in his behalf by a Court of Equity. By the Plaintiff's own witness, it appears that Agnew received seventeen dollars from Defendants, and that Plaintiff was present when the money was paid to Agnew. The Court found the amount due or paid to Bidwell was $1,080, and this amount, with that paid Agnew, makes up nearly the $1,100 which goes to confirm the Defendant's statement as to the nature of the transaction.

Among the conclusions of fact found by the Judge were, "That on the 4th day of May, 1858, the said Bidwell, for a valuable consideration, duly transferred and assigned the said mortgage and note to the Defendants.

"That said Bidwell executed the assignment thereof hereinbefore referred to, to Defendants, as a further security to the Plaintiff's said mortgage, for the payment of the said four notes for $1,100."

These findings, it is claimed, are inconsistent and contradictory to each other. The first merely finds that the Bidwell mortgage was assigned to the Defendants, and the next, that it was assigned as a further security for the Plaintiff's mortgage. These findings are not inconsistent with each other, the one only stating the fact of the assignment, and the other

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the object. The Defendants introduced in evidence the assignment of the Bidwell mortgage to Defendants, being, upon its face, an absolute assignment of the mortgage; and Plaintiff claims that the evidence was insufficient to sustain the allegations of the answer, that it was taken as collateral security. But this was but a part of the testimony on that head, as Sanford swears that "the Bidwell mortgage was assigned as collateral security for the Plaintiff's mortgage." The weight to be given to this testimony, is a matter exclusively for the Court to determine. The burden of proof rested on the Plaintiff to show that his mortgage was given for any other purpose than that which it purports on its face, and the fact that the assignment upon its face was absolute, would not tend to prove or disprove, of itself, the main issue in the case.

It is also claimed that the Defendants cannot contradict the written evidence, under seal, of their own transaction, without alleging accident, fraud, or mistake. Whether the evidence that the Bidwell mortgage was taken by the Defendants, as collateral security for the Plaintiff's mortgage, could have been properly received or not, under the pleadings, had it been objected to, it is unnecessary to determine, since, so far as the case shows, the evidence was received without objection. Where evidence has been received in the Court below without objection, it is too late to raise the question of its admissibility in this Court.

It is further contended by the plaintiff that unless the transaction is considered a sale of the Bidwell note and mortgage to Defendants, they had no right to the same; that if the money borrowed from Defendants, as alleged, paid the debt to Bidwell, he could not assign the same, for there was nothing to assign. But the legal title of the Agnew note and mortgage was in Bidwell, and even though his debt was paid, it was competent for him, with Agnew's consent, to assign the same to Defendants, as further security for their loan. Nor can the question here be raised as to whether the Defendants were rightfully the holders of that note and mortgage, since there was no issue upon that point. The complaint alleges that this note and mortgage, on May 4th, 1858, were duly as-

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signed by Bidwell to Defendants; that the said assignment was duly recorded, and that the same had been duly foreclosed by Defendants. The main issue raised by the pleadings is, whether this note and mortgage were held be Defendants, as collateral security for the Plaintiff's mortgage, or *vice versa*. The Plaintiff cannot now dispute the validity of the assignment of the mortgage from Bidwell to Defendants.

The Court has found, as matter of fact, that the Plaintiff executed the mortgage (from which he seeks to be relieved,) to secure the payment of the four promissory notes mentioned in the complaint; that said mortgage was executed by said Plaintiff freely and voluntarily, and without any inducement held out, or representation made, or deception used by the said Merritt or others, to secure the payment of the said notes for $1,100, and that said Bidwell executed the assignment of the mortgage from Agnew to him, to the Defendants, as a further security to the Plaintiff's said mortgage, for $1,100, of the execution of which assignment Plaintiff and Agnew had knowledge. With the finding of the Court below upon these facts, as before stated, we see no ground of error, and the conclusions of law, therefrom, are correctly stated.

The order denying a new trial is affirmed.

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JUSTUS C. RAMSEY, Appellant, *vs.* CHARLES MERRIAM, *et al.* Respondents.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

In a mortgage foreclosure by advertisement, the amount claimed to be due at the date of the notice, should be the sum legally due, but a trifling excess in such amount, arising from mistake, and not of sufficient magnitude to deter bidders, will not vitiate the sale. Any amount within the terms of the security may be claimed in the notice. The case of *Spencer vs. Annan* 4 *M. R.*, 542, approved.

It is not essential to the validity of a notice of sale, in a foreclosure by advertisement, that it should be dated. When it is dated, the time so fixed will be taken as the true date. When nothing appears upon its face evidencing the date, the time of its first appearance, by publication, will be the date.

A mortgagee may become the purchaser, at a mortgage sale, of land, under a power that runs to himself, provided the sale is made in good faith, by the Sheriff, in accordance with the provisions of the Statute.

The Appellant commenced his action in the Court below, the nature of a bill in equity to set aside a sale of certain real estate which had been made by the Respondents, under a power of sale contained in a mortgage executed by the Appellant to the Respondent, Charles Merriam, and at which sale the respondent, Caldwell, officiated as Sheriff of Ramsey county, where the mortgaged premises were situated. The complaint also prayed an injunction prohibiting the respondent, Caldwell, from giving a Sheriff's deed of the premises to the Respondent, Merriam, who had purchased the premises at the sale. The complaint alleged certain irregularities in the sale, for which this relief was prayed.

The answer denied all allegations of irregularity, and then set up affirmatively, that after the Appellant had made the mortgage in question, but prior to the commencement of this action, the Appellant had, by certain deeds, granted and conveyed all his interest in the mortgaged premises to one Alexander Ramsey, his heirs and assigns forever, and that the said Appellant had not, at the time of commencing this action, and has not now, any right, title, inter-

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est, estate, equity of redemption, or claim whatsoever, in or to the said lands or premises, or any part thereof.

The appellant, in his reply, admits he so conveyed as stated but alleges that the deeds were full covenant deeds, and that therefore, by reason of the said covenants, the Appellant had, at the commencement of this action, and now has "a right, title, interest, estate and equity of redemption in the said premises."

The case was referred to James Gilfillan, Esq., to hear and report a judgment. On the trial before him, Defendants made a motion for judgment on the pleadings, which was granted, and judgment entered on the report of the referee.

The Plaintiff appeals to this Court.

Points and Authorities of Appellant.

I.—The complaint states a cause of action in this, to wit:

1st. It appears from the complaint that the debt was immature at the commencement of the foreclosure.

2d. It appears that the amount claimed in the notice of foreclosure, exceeded the amount already due. *Annon vs. Spencer*, 4 *Minn. R.*, 542; *Rev. Stat.*, *p.* 644, *sec.* 5.

3d. It appears that the notice of foreclosure was not dated as the statute prescribes. *Rev. Stat.*, *p.* 644, *sec.* 5.

4th. It appears that the sale was illegally postponed. *Rev. Stats. p.* 644.

5th. It appears that the power of sale in the mortgage run to the mortgagee, and the alleged sale under such powers was to the mortgagee, and is therefore null. *Hill. on Mort.*, *p.* 84, &c.; *Rev. Stats.*, *c.* 34, *sec.* 1, 2, 3; *Ib.*, *c.* 77, *sec.* 156, inclusive; *Stapp v. Talis*, 3 *Bibb.*, *Ky. Rep.*, *p.* 450, and cases; 6 *B. Monroe Ky. Rep.*, 608, and cases; 5 *Ib.*, 337, and cases; 4 *Com.*, 266.

II.—It appears from the pleadings that the Plaintiff, Ramsey, has such an interest in the event of the action as to make him a proper party Plaintiff.

Points and Authorities of Respondent.

I.—The Appellant having, before commencing this action,

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parted with all interest in the mortgaged premises, has now no interest in the subject matter of the suit, and therefore cannot maintain this action. *Story's Equity Pleadings, sec.* 232.

Nor has he any proper title to institute a suit concerning the subject matter of this action, though he may have a remote interest concerning it. *Story's Equity Pleadings, secs.* 503-509; *Ibid, sec.* 197.

It is apparent, too, that the vendee, Alexander Ramsey, has a right to commence this action; and that he will not be bound by any judgment in this case. He is the sole owner of the estate before owned by the Appellant. What right has the Appellant to commence an action respecting his property?

A bill to redeem, too, would have to be brought by Alexander Ramsey, and could not be brought by the Plaintiff alone, for he would have no right to redeem. *Story's Equity Pleadings, sec.* 182, 187.

This action is, in fact, an action by Justus C. Ramsey, to determine the conflicting claims of Alexander Ramsey and Charles Merriam to a piece of land in which Justus C. has confessedly no interest whatever.

Again, did the covenants in the deed give the Plaintiff sufficient interest to maintain this action, it would not be competent for him to set it up in reply—his complaint being founded on a different cause.

On the points made by Appellant's counsel, supposing the interest sufficient, we have nothing to urge. If they are well taken, they are matters of record, and afford no foundation for this action, though good grounds of defence. *Cox vs. Clift., 2d Comstock*, 118, and cases cited.

II.—As to the first point, to wit, that the debt was immature at the commencement of the foreclosure, it was abandoned as not true in fact.

III.—As to the second, that the amount claimed to be due, exceeded that really due, we would say that *Annan v. Spencer* does not apply.

The amount claimed in the notice is the exact amount due on the face of the notes, and although the Plaintiff claims

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that the notes should draw interest from a time subsequent to the terms of the note, yet the Defendant contests the claim, and has in good faith stated what he claims to be due. Therefore, *Spencer vs. Annan* has no application.

IV.—The Statute does not require the notice of foreclosure to be dated; moreover the notice had upon it the date of the first publication, and as it only becomes a notice when published, it was thus really dated.

V.—The question of sale to the mortgagee is one of construction of the Statute, and intention of the Legislature. We think it plain from the Statute, that the mortgagee may always buy.

In *Jackson vs. Colden*, 4*th Cowen*, 266, such a sale was upheld. The mortgagee merely employed an auctioneer, to make the sale, bought himself, and brought ejectment. No deed was made to him, and on the trial it was objected that he had no deed. The Court overruled the objections, and the Plaintiff recovered, though there was no provision that where the mortgagee buys, no deed need be made. Our Statute has provided against the very difficulty that arose in that case, by enacting that in case of a purchase by the mortgagee, the affidavits shall be sufficient. It is clear that in that provision they intended to obviate the technical difficulty of a man's deeding to himself. *Comp. Stat.*, 646, *sec.* 19.

VI.—Should the Court hold the point as to the amount claimed to be due, not well taken, all the other points are apparent on the record, and, whether good or bad, will not sustain this bill.

Bribbin & Masterson, Counsel for Appellant.

Allis & Peckham, Counsel for Respondent.

By the Court—Flandreau, J.—The object of this action is to set aside the sale made under the mortgage, for several reasons.

1st. That too much is claimed in the notice to be due.

2d. That the notice has no date.

3d. That the postponment of the sale was irregular.

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4th. That the power of sale contained in the mortgage running to the mortgagee, he could not become the purchaser of the land under the power.

The answer sets out a state of facts showing that the amount claimed was not excessive; alleges the regularity of the postponement, and shows the sale to have been made by the Sheriff of the County. It also alleges that the Plaintiff had, previous to the commencement of the action, conveyed to one Alexander Ramsey the lands mentioned in the mortgage, and all his "right, title, interest and estate, and equity of redemption" in them, claiming that he had no interest after such sale which would entitle him to maintain this action.

The reply reiterates the charges in the complaint as to the excess claimed; also those as to the regularity of the postponement; and as to the sale of his interest in the lands he admits it, but avers that the deeds contained covenants that he was well seized in fee of the lands, and had good right to convey the same, against incumbrances, and for quiet enjoyment, etc.

Judgment was given for the Defendant upon the pleadings.

The mortgage was given to secure three promissory notes, one for $15,000.00, and two for $1,350.00, each, all dated on the 29th day of May, 1858. The note for $15,000.00 was for the principal sum loaned, and was to run one year; the other two were for the interest and were made payable in six and twelve months; none of the notes drew interest, but all contained a stipulation that if not paid at maturity, they should draw interest at the rate of three per cent. per month.

The note falling due in six months was paid. The other two were not paid. They matured on the first day of June, 1859. The mortgagee commenced his foreclosure on the 7th day of July, 1859, one month and seven days after the due date of the notes. His notice claimed that there was due on the mortgage the sum of $16,870.00 at the date of the notice. If the mortgagee computed the interest from the due date of the notes at three per cent. per month until the commencement of the foreclosure, the sum would be $16,954.95, together with the exchange on New York which was stipulated for. If the computation was made at the rate of seven per

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cent. per annum after the notes fell due, the sum would be $16,467.62, and exchange. The Plaintiff insists that there was but the sum of $16,385.00 due, which sum he probably arrives at by deducting all interest during the period from the date of the notes until he actually received the money from Merriam, and computing the interest after their maturity at seven per cent. per annum.

The Plaintiff relies upon the case of *Annan vs. Spencer*, 4 *M. R.*, 542, to sustain him upon this point. In that case the amount due upon the note was $964.62, and the amount claimed in the notice was $1,606.60. We set aside the sale on the ground that such a false claim would necessarily have the effect of deterring bidders, and was a fraud upon the mortgagor. It was however on account of the greatness of the excess claimed, it being about sixty-five per cent. more than the note called for. In the opinion delivered by the Court in that case this qualifying language occurs.

"We do not hold that it is absolutely necessary to state the exact amount legally due; for a party under a mistake of law or fact, may honestly claim more than by law he would be entitled to, and if any other party is not shown to be prejudiced thereby, the sale should not be disturbed. The mortgagee may be ignorant of, or contest certain alleged payments. He may estimate the amount according to the strict terms of the contract, or may err simply in a computation of the interest; and if under such circumstances he claims more than he could legally recover, it does not necessarily vitiate the sale. Perhaps any amount within the terms of the contract may in good faith be claimed without affecting the legality of the notice. But we do hold that a party cannot arbitrarily or wantonly claim in his notice a sum which neither the terms of the contract, nor any legitimate calculation based thereon will justify."

In this case according to the strict terms of the notes, a greater sum could have been claimed than was demanded, and in no aspect of the case was the excess when compared with the sum actually due, of sufficient magnitude to have influenced purchasers one way or the other. It is our opinion therefore that the sale should not be disturbed for this reason.

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There are other and more appropriate means of redress where a mortgagor is injured by such a transaction. *Bidwell vs. Whitney*, 4 *M. R.*, 89.

The statute (*Comp. Stat.*, *p.* 644, §5,) does not require the notice of foreclosure to be dated. The only part of the section from which such a requirement can be inferred, is the third subdivision, which declares that the notice shall specify "the amount claimed to be due thereon at the date of the notice." The date of a notice does not mean exclusively the note appended to it stating its date, which although is properly called the date, is, strictly speaking, the evidence of it. It is also the actual time of its issuance whether expressed or not. Therefore the mere omission to inscribe the date upon the notice can in no way effect its validity, so long as the amount claimed is correct at the true date. The counsel for the Defendant claims that the true date of the notice is the time of its first appearance by publication, because before that time it is not a notice at all, but simply a silent writing, which may, or may not become a notice accordingly as it is published or suppressed. Our view is, that when the mortgagee writes the date upon the face of the notice, that fact will control, and the amount claimed must correspond with the time so stated; but when no evidence of the date appears upon the face of the notice, the time of its first publication is its date. This rule by removing all doubt concerning the date, practically satisfies the demands of the statute.

It is a sufficient answer to the charge that the postponment was irregular, that the complaint does not state any facts showing it to be irregular. The averment in the complaint is simply that the sale did not take place at the time specified in the notice, and that no postponment of the sale was ever duly given. No fact is alleged upon which issue can be taken.

The power under which the land was sold, was contained in the mortgage, and ran to the mortgagee. It is contended that under such a power the mortgagee could not become the purchaser. The validity of such powers was for a long time doubted even, where they did not run to the mortgagee; but it is believed that all such doubts are now removed, and the practice of inserting such powers in mortgages has become

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very general, and was authorized in many of the States and in England long before the adoption of the statutes of Minnesota in 1851; 1 *Hilliard on Mortgages*, 118 *to* 128, 1*st Ed.* A mortgagee, with a power to sell the estate on default being made in the condition of the mortgage, stands in the relation of a trustee of the mortgagor's rights, and in the absence of statutory authority would not be permitted to become himself a purchaser of the estate, under the very familiar principle that a trustee is not allowed to purchase the property of his *cestui que trust*. *Baldwin vs. Allison*, 4 *M. R.*, 25, 30, and cases there cited. There can be very little doubt that the legislature has the power to change this rule in all, or in particular cases, and it is for us to determine whether they have done so in regard to powers of sale in mortgages where the power is vested in the mortgagee.

The statute of this State, (*Comp. Stats.*, 643, *Ch.* 75,) it is true, does not speak of a power of sale running to the mortgagee in terms, but generally of mortgages, that contain powers of sale (*Sec.* 1); and where it provides the time, place and manner of the sale (*Sec.* 6), it declares that the sale shall be made "by the person appointed for that purpose in the mortgage, or by the Sheriff." Express power is conferred upon the mortgagee to become the purchaser at a sale made under this statute (*Sec.* 9), and the legal difficulty which would arise in the case of the mortgagee conveying to himself, is obviated by *Section* 19, which provides that in such cases the affidavit, &c., shall have the same effect as a deed from the mortgagee upon a sale to a third person. If the power to sell was made to the sheriff or any third person, and should be executed by them in pursuance of the statute, no doubt could be raised of the right of the mortgagee to purchase at the sale, because the relationship of trustee and *cestui que trust* would not exist, and the statute expressly authorizes a purchase in such case by the mortgagee. Should the power run to the mortgagee, and the sale be made by him in person, an agent selected by him acting as auctioneer, it would be equally clear that he could not become the purchaser, because the characters of purchaser and seller are utterly incompatible in the same person at the same time. We think the framers of the statute in

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selecting the Sheriff, a responsible public officer to act, had in view the very case of the power being conferred upon the mortgagee, and designed to take from him the right to select his own agent to make the sale, when he wished to purchase, and thus to prevent any chance of collusion and undue advantage. The Sheriff cannot be said to be the agent of the mortgagee in making the sale, because the latter has no choice in his selection. He is chosen by the statute, and is the agent of the law as much as when he makes a sale on execution. The Sheriff being entirely indifferent, and acting under the obligation of his official oath and bond, there is no presumption of partiality one way or the other, and none of those elements that cast suspicion upon a purchase of trust property by a trustee. It would be doing violence to the intention of the legislature to suppose that they were only granting the privilege to purchase to the mortgagee, when the power to sell was vested in some other person, when the almost universal practice was the other way at the time of the passage of the act; the intention to so restrict the right to purchase by the mortgagee, would at this day require very clear and satisfactory evidence before a court would be justified in disturbing half the titles in the State, as a decision of that character would have the effect of doing. We think everything tends to the opposite conclusion however, and so hold.

As we see no ground upon which to interfere with the sale, it becomes unnecessary to discuss the question as to whether the Plaintiff has any interest in the lands, upon which he can maintain this action.

The judgment is affirmed.

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FELIX MEIGHEN *et al.*, Appellant, *vs.* WILLIAM H. STRONG, Respondent.

APPEAL FROM THE DISTRICT COURT OF FILLMORE COUNTY.

In an action brought under the statute to determine a conflicting claim to real estate, a denial of the Plaintiffs possession forms an issue that must be tried; and it is error to enter judgment until such issue is determined.

The record of a deed for the conveyance of lands in this State, executed in the presence of but one witness only, cannot be admitted in evidence.

Where, as in this State, the statute prescribes the manner in which only a conveyance of real property by deed can be made, any attempt to convey without complying with the requisites of the statute must be treated as a nullity; and the Legislature could not give it validity so as to affect persons who may have subsequently acquired title to the property, without divesting them of rights which they had legally acquired.

Where there were several issues of fact, joined in the pleadings, and the jury having been sworn to try the issues joined between the parties, found and returned a special verdict which passed upon but one issue, and a judgment was predicated upon such verdict only—*Held*, that the verdict was not sufficient to warrant the judgment.

Points and Authorities for Appellants.

This action was brought under *section 1 of chapter 64, of the Public Statutes*, for the purpose of having determined an adverse claim of Defendants to certain real property. The Plaintiff recovers, if at all, upon his possession "by himself or his tenant," and having failed to prove such possession, the Defendants were entitled to the nonsuit or dismissal, as moved for on the trial. It was error in the Court below to refuse it.

The Court below erred in admitting the deposition of Pickett, taken under the provisions of *chapter 84 of the Public Statutes*, relating to "taking the testimony of witnesses within this State." That chapter provides, *sec. 18*, that the deposition shall be delivered by the Justice to the Court, &c., "or shall be enclosed and sealed by him and directed, &c." It did not appear that these provisions were complied with, and the deposition ought, therefore, to have been exclnded.

The deed from Hayles to Brockett having been executed in the presence of but one witness, conveyed nothing, and the

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record thereof ought not to have been admitted in evidence. *Pub. Stats.*, *chap.* 35, *sec.* 8, *and* 14 *to* 22 *incl.*; *Act of July* 26, 1858, *sec.* 1; *Pub. Stats.*, 403, *sec.* 52; *Act March* 4, 1854, *sec.* 2; *Id.*, 402, *sec.* 41; *Good's Leesee vs. Zercher*, 12 *Ohio*, 364; *Meddock vs. Williams*, 12 *Id.*, 377; *Silliman v. Cummings*, 13 *Id.*, 116.

Points and Authorities for Respondent.

I.—Actual possession has been proved.

II.—No adverse possession being proved, the constructive possession resulting from a claim of legal title under a recorded deed is sufficient to support this action. *Royall vs. Lisle*, 15 *Geo.*, 545.

III.—Possession of a particular parcel of land under colorable title is possession of the whole embraced in that title. *Hibbard vs. Foster*, 24 *Vt.* (1 *Deane*), 542; *Thomas vs. Kelly*, 13 *Ired.*, 269; *Swift vs. Gage*, 26 *Vt.* (3 *Deane*), 224; *Chiles vs. Conley*, 9 *Dana*, 385; 9 *Vt.*, 383.

IV.—Actual residence and cultivation are not necessary to maintain possession of timber land. *Stephens vs. Leach*, 19 *Penn.* (7 *Harris*), 262; *Ellicott vs. Pearl*, 1 *McLean*, 206; *Tredwell vs. Reddick*, 1 *Iredell*, 56; *Spear vs. Ralph*, 14 *Verm.*, 400.

V.—The deposition objected to was enclosed, sealed, directed and transmitted, as required by Statute, but if not, an objection to the sufficiency of the endorsements on the wrapper should be made before the envelope is opened. *Brumskell vs. James*, 1 *Kernan*, 294; *Park vs. Bancroft*, 12 *Alabama*, 468.

VI.—It does not appear that the deposition was material to the issue, nor that the evidence without it would not have justified the verdict. The objection was technical, and the verdict should not be disturbed unless it appears that injustice was done. 1 *Graham & Waterman on New Trials*, 341; *Johnson vs. Blackman*, 11 *Conn.*, 342; *Kimberlin vs. Faris*, 5 *Dana*, 533; *Barry vs. Bennett*, 5 *Met.*, 354.

VII.—The deed objected to, was made legal and valid by act of the Legislature, passed July 26, 1858. *Pub. Stat. of*

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Minnesota, 403; *Watson vs. Mercer*, 8 *Pet.*, 88; 3 *Watts*, 294, *S. P.* 8 *Mass.*, 472.

VIII.—The jury found that Meighen had actual notice of a deed from Hayles to Brockett.

No one can dispute the validity of such deed, except a *bona fide* purchaser, without notice.

IX.—The execution of such deed was not in issue, being admitted by the answer.

Norton & Mitchell, and R. Wells, and N. P. Colburn, Counsel for Appellants.

H. C. Butler, Counsel for Respondent.

By the Court—Emmett, C. J.—This action was brought under that provision of our statute which authorizes any person in possession of real property by himself or tenant, to commence an action against any one claiming an adverse interest or estate therein, for the purpose of having such adverse estate or interest determined. *Comp. Stat.*, 595, *Sec.* 1. The evident design of the legislature in passing this act, was to give to parties in possession of real property, the same facilities for testing the merits of adverse claims of title, that are always at hand for those who are excluded from the possession, but claim an estate therein adverse to that of the occupant. The latter may at any time, before they are barred by the statute of limitations, bring an action against the occupant to recover the possession of which they are deprived; while the occupant, being in the enjoyment of all his rights, has, without the aid of the statute, no right of action until he has in some manner been interfered with. He would therefore have to await the leisure of those claiming adversely, and they may never urge their claims until the evidences by which the title of the occupant is established, or their own repelled, may become lost or obscured. To avoid such a contingency the statute authorizes the occupant to institute proceedings against any one claiming an adverse interest or estate, by which the party so claiming is forced at once, either to establish his claim, or abandon it altogether. Such being

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the object and design of the law under consideration, the importance to the Plaintiff of showing himself in possession of the premises, is apparent; for on that depends his right to bring the action under the statute.

In the present case the Plaintiff made the necessary allegation as to his possession, and the Defendants by their answer put his possession directly in issue. On the trial of this issue, after the Plaintiff had submitted all his testimony touching his possession, the Defendants moved the Court to dismiss the action, on the ground that the Plaintiff had failed to show himself in possession of the property in dispute. The Court refused to dismiss, and the refusal is here urged as ground for reversing the judgment.

The evidence on this point, which the record discloses, is not very satisfactory, but still if the jury were to pass upon that issue, there was enough perhaps to justify the Court in submitting the evidence to them, with proper instructions as to its legal effect.

There is however another point made in this case, wherein we think the decision was clearly erroneous. The Court admitted in evidence under the objection of the Defendants, the record of a deed from Hayles to Brockett, which appears to have been executed in the presence of one witness only. In the case of *Parret vs. Shaubhut*, 5 *Minn.* 323, this Court decided that the statute which requires that a conveyance of lands shall be executed in the presence of two witnesses who shall subscribe their names thereto as such, is imperative, and must be complied with to give the instrument any validity as a conveyance. Every conveyance of lands must be in writing, under seal, signed by the grantor, and executed in the presence of two witnesses, who shall also sign the same as such. Each of these requirements is essential to the validity of the conveyance, and one cannot be dispensed with more than another. Had the contract of conveyance to Brockett been by parol, or without seal or signature, it would have been regarded as an attempt only to convey the lands; and no one, even with a full knowledge of such attempt, would, on that account alone, have hesitated to purchase from Hayles; and yet, by the statute, it is no more essential that

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the conveyance should be in writing, or signed or sealed by the grantor, than that it should be executed in the presence of, and attested by two witnesses.

In this view of the law it will be apparent that it is wholly immaterial whether the Defendants, or either of them, knew of the attempted conveyance by Hayles to Brockett, at the times they respectively purchased the premises. At the time of the conveyance from Hayles to Meighen, Hayles had not yet conveyed away his title, and unless there were facts bearing upon the transaction, other than the mere void conveyance to Brockett, Meighan had a right to disregard Brockett's deed, and take a conveyance to himself; just as he might have done had Hayes attempted to convey the land to Brockett by parol, or by an instrument without signature or seal.

The act of July 26, 1856, declaring all conveyances executed in the presence of one witness, to be legal and valid, (*Com. Stat.*, 403-4,) does not, in our opinion, aid the Plaintiff. The rights of the Defendants had accrued before this act was passed. Where there has been an actual conveyance of lands, but the conveyance is defectively executed, the Legislature may cure the defect, so far, at least, as to bind the parties thereto; for if the defect relates merely to the evidence by which such a conveyance is to be established, the rule of evidence may be so changed as to enable it to be shown by evidence, which, without such change, would have been adjudged insufficient; and this would be binding not only upon the parties, but all who subsequently acquire title with a knowledge of the former conveyance. In that case the Statute would operate, not upon the conveyance itself, but upon the evidence by which it is to be established, and could not be said to affect the title, for that had already passed, though the evidence of it was insufficient. But when, as in this State, the Statute prescribes the manner in which only a conveyance of real property by deed can be made, any attempt to convey without complying with the requisites of the Statute, must be treated as a mere nullity, and the Legislature could not give it validity, so as to affect persons who may have subsequently acquired title to the property, without divesting them of rights which they had legally acquired.

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There are other questions arising upon this record which we cannot forbear alluding to, although they are not presented by counsel; nor are they necessary to the decision of this case. This is an action in which, by the terms of the Statute, all the issues of fact must be tried by the Court, unless by the order of the Court, or the consent of the parties, they, or some specific fact involved therein, are submitted to a jury or referee. *Com. Stat.*, 557, *sec.* 6 and 7. It seems, however, to have been assumed in this case, that the issues must be tried by a jury, for the record shows no order of Court for the submission, nor any consent of parties that a jury should try the issues. The jury were sworn to try "the issues joined between the parties," but instead of finding upon all the issues, or generally for the Plaintiff, they return a verdict which is special in form, and refers to but one issue. It was recorded in the language following:

"We, the jury, find that at the time the deed was made by J. B. Hayles to Meighen, that Meighen had notice of a deed having been made by Hayles to Brockett."

This verdict falls far short of determining "the issues joined between the parties," and yet, as appears by the record, the judgment for the Plaintiff is predicated wholly upon this finding. The verdict is not sufficient to warrant the judgment, so long as the issue as to the Plaintiff's possession remains undisposed of. For we might admit all that is found by the jury, and even that the land had been conveyed to Brockett by an instrument sufficient in every particular; and yet if the Plaintiff was not in possession, he could not maintain this action. The judgment is erroneous therefore in any aspect of the case. The issue as to the Plaintiff's possession having been made, should have been determined in favor of one party or the other. If it was submitted to the jury, they should have passed upon it, and if it was not so submitted, it should have been decided by the Court.

The order of the Judge, refusing to set aside the verdict and grant a new trial is reversed, and a new trial awarded.

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DORILUS MORRISON, CADWALLADER C. WASHBURN, & ELIHU B. WASHBURN, Partners as "D. MORRISON & Co., Appellants, vs. JAMES O. LOVEJOY, Administrator of JOHN L. LOVEJOY, deceased, JAMES A. LOVEJOY and JOHN G. BROCKWAY, Respondents.

APPEAL FROM THE DISTRICT COURT OF HENNEPIN COUNTY.

The allowance of a warrant of attachment is a judicial act, and *Section* 142, *page* 550 *of the Compiled Statutes*, so far as it authorizes clerks of the District Courts to allow warrants of attachment, is in conflict with Section 1 of Article 6 of the State Constitution.

An attachment may issue in all actions brought for the recovery of money.

An affidavit for an attachment in the District Court must state facts and circumstances sufficient to satisfy the officer that the case is a proper one, under the Statute, for such remedy.

The appeal in this action is brought from an order granted by his Honor, Thos. Wilson, acting Judge of the District Court, Fourth Judicial District, Hennepin County, denying a motion made by the Defendants in the Court below to vacate and set aside a writ of attachment.

The writ was allowed by the Clerk of the District Court, upon the following affidavit issued therein:

Hennepin County, ss. Jared S. Demon being duly sworn, deposes and says that he is an attorney for the Plaintiffs in the above entitled action; that a cause of action exists in favor of the Plaintiffs against said Defendants, which is now in suit in said Court; that the amount of Plaintiffs' claim is over one hundred and nine thousand dollars; that the grounds thereof is the breach and non-performance of a certain contract, made and entered into by and between the said Plaintiffs and Defendants in relation to the manufacturing of lumber for the Defendants by said Plaintiffs, at what are called Steele's Mills, in St. Anthony; that the Defendants, Cadwallader C. Washburn and Elihu B. Washburn, are non-residents of this State; that deponent is informed and believes

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that said Elihu B. is a resident of the State of Wisconsin, and the said Cadwallader C. is a resident of the State of Illinois; that neither the said Elihu B. or the said Cadwallader C. ever resided in the State of Minnesota; that the said Dorilus Morrison for the purpose and intention of hindering, delaying and defrauding his creditors, as deponent is informed and believes, sometime during the year 1858 or 1859, conveyed by warrantee deed a large number of lots of land in the village of Minneapolis in said county; that deponent is informed and believes that said lots were all the real estate owned by said Defendant Morrison, and that the said conveyance was made to one W. D. Washburn, a brother of the Defendants Washburn, and that Plaintiff will be in danger of losing his said debt unless an attachment issues therein.

Points and authorities of Appellant.

I.—That a warrant of attachment can only be issued by the Clerk of the District Court, upon the written order or allowance of competent authority; and a warrant issued in the absence of such authority, is simply void. *Min. State Constitution, Art. 6, Sec. 1; 1 Min.*, 82.

II.—That the Clerks of the several District Courts have no power or authority to grant or allow the issuance of a warrant of attachment; the allowance of such writ being a judicial act, the issuing a ministerial one. *1 Min.*, 82; *1 Monell*, 458; *N. Y. Code, Sec.* 228-9, and cases there cited.

III.—That the affidavit made for the purpose of obtaining the allowance of a warrant of attachment must set out the cause of action clearly and fully, and it is not enough that the complaint in the case does so; that will not aid the omission in the affidavit. *1 Monell Pr.*, 457; *14 Wend.*, 267; *21 Wend.*, 672; *4 Hill*, 598; *6 Minn.*, 29; *17 How., Pr. R.*, 556.

IV.—That the affidavit in this case was clearly insufficient to warrant the issuance of the writ. *6 Minn.*, 29; *Comp. Stat. R.*, 550, *Sec.* 136; *10 Wend.*, 420; *5 Hill.*, 606; *1 Barb.*, 410; *3 Sandf. Superior C. R.*, 703; *12 Barb.* 298.

V.—That the warrant was not only irregularly, but improvidently issued, in that, among other things, the undertak-

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ing was for an insufficient amount. *Comp. Stat. p.* 551, *Sec.* 137; 1 *Monell Pr.*, 458; 18 *Wend.*, 611.

VI.—That there was no order or allowance directing or authorizing the Clerk to issue the writ, and it is therefore void. The style of the process is not in accordance with the requirements of *Sec.* 14, *Art. VI*, (6,) *of Constitution.*

VII.—That the action being for unliquidated damages, a warrant of attachment will not lie and cannot be sustained. *Comp. Stat.*, 550, *Sec.* 136; 6 *Wend.*, 558.

F. R. E. Cornell and D. Cooper, Counsel for Appellants.

J. S. & D. M. Demmon, Counsel for Respondents.

By the Court—Flandrau, J.—*Section* 142, *page* 550 *of the Compiled Statutes*, so far as it authorizes the clerks of the District Courts to allow warrants of attachment, is in conflict with *Section* 1 *of Article* 6 *of the State Constitution.* The allowance of the warrant is a judicial act; it involves the examination of proofs and a decision thereon, and is final until set aside by the Court. It is not done subject to the approval of the Court, and requires no confirmation to perfect it.

It is sufficient to state in the affidavit that a cause of action exists against the Defendants, the amount of the claim and the grounds thereof. All that is necessary in this respect is, that the action is for the "recovery of money." *Davidson vs. Owen et al.*, 5 *Minn. R.* 69; *Comp Stat.*, *p* 550, *secs.* 142, 144.

The affidavit, so far as the Defendant Morrison was concerned, was entirely insufficient. The only fact or circumstance contained in it as against him is as follows: "That the said Dorilus Morrison for the purpose and intention of hindering, delaying and defrauding his creditors, as deponent is informed and believes, sometime during the year 1858 or 1859, conveyed by warrantee deed a large number of lots of land in the village of Minneapolis, in said county; that depenent is informed and believes that said lots were all the real estate owned by said Defendant Morrison, and that the said conveyance was made to one W. D. Washburn a brother of the Defendants Washburn." The motive of the

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conveyance is stated merely upon the information and belief of the deponent, and no fact or circumstance is alleged from which such improper motive could be inferred. It is not made to appear that the cause of action upon which the suit is brought had accrued at the time the lots were conveyed, or that Morrison had a single creditor at the time. We have frequently held that proof of this character will not authorize the allowance of an attachment. *Pierse vs. Smith*, 1 *Minn. R.*, 82; *Id.*, 222–3; *Curtis vs. Moore*, 3 *M. R.*, 29.

The order refusing to quash the attachment is reversed, and the warrant quashed.

SIMEON P. FOLSOM, *et al.*, Appellants, *vs.* JOHN A. LOCKWOOD, Respondent.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

The lien of a mortgage lasts as long as the debt which it is given to secure; and nothing but an actual payment of such debt, or an express release, will operate as a discharge of the mortgage.

If the mortgage contain a power of sale, and the mortgagee sell the land in pursuance of the power, and the sale is afterwards set aside at the instance of the mortgagor, by a court of competent jurisdiction, the lien of the mortgage is not thereby discharged.

This action was brought to foreclose a mortgage executed by the Appellant, Folsom, to the Respondent. The complaint contained the usual allegations, and set out certain proceedings which had been taken to collect the amount due on the mortgage, substantially as follows: that by virtue of a power of sale in the mortgage contained, the mortgagee had attempted to foreclose the same under the statute, by notice duly given, &c., and that at the sale under the notice and power, the mortgaged premises had been sold in one tract or parcel,

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(the premises consisting of several city lots.) That the mortgagee became the purchaser at said sale, and that he had received a Sheriff's Deed for the premises at the expiration of the time limited for redemption.

That the mortgagor refused to deliver possession of the premises, and the Plaintiff had commenced an action before a Justice of the Peace, under the statute, to obtain possession. That an appeal was taken from the judgment of said Justice, to the District Court for Ramsey county. That upon the trial in said District Court, judgment was rendered in favor of the Defendant, Folsom, on the ground that the said sale and foreclosure and the proceeding thereunder were null and void, because the said premises had not been sold in separate parcels, and that said judgment was still in full force, &c., &c., and demands the usual judgment and decree of foreclosure.

The Appellant appeared and demurred to the complaint, upon the ground—

First.—The complaint does not state facts sufficient to constitute a cause of action.

Second.—It appears that the mortgage described in the complaint contained a power of sale according to the statute.

Third.—It appears that the mortgage has been foreclosed by a sale of the premises, and that the principal debt has been extinguished.

Fourth.—The complaint contains (if any,) two causes of action which are not separately stated.

The Court below overruled the demurrer and Defendants appealed to this Court.

Points and Authorities of Appellant.

I.—The Court below erred in overruling the demurrer to the complaint for the following reasons:

1st. In this State a mortgage constitutes a mere lien. That lien in this case has been extinguished by a sale of the land under the power and statute—the sale was defective and voidable—not void. *Rev. Stat.*, *p.* 394, *sec.* 35; *p.* 396, *sec.* 60; *p.* 596, *sec.* 11. [The statutes have declared that to be "law"

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which has always been equity. *Kent's Comm., 2d Ed., 4th vol. Mortgage*, III, *p.* 164.] 1 *Barb. Rep.*, 379; 2 *Wend. Rep.*, 298; 4 *Cowen*, 166; 10 *Paig.*, 254; 8 *John. Rep.*, 334, 361.

A lien is in all cases extinguished when the prerequisites of such lien have been lost, without the fraud, violence or crime of the person against whom the lien operates, and then it is valid only because such person is estopped from questioning its validity by his own wrongful acts.

In this case there was no fraud in the mortgagor, therefore the sale was valid until objections were made and the same was set aside; but if it was valid *pro tempore* the title passed by it and the lien of the mortgage then must have been discharged; any other view of the case would make a mortgage a lien upon land forever, if the sale was defective.

2d. The mortgage lien having been lost by a "mistake of law," equity has no jurisdiction to give relief, and especially since such mistake was made in a quasi judicial proceeding. *Jackson vs. Henry*, 10 *John. R.*, 185; *Story's Eq. Jur., Sec.* 111, &c., &c.

3d. A foreclosure by advertisement under our statute is a concurrent remedy with a bill in Chancery, like a *scire facias* or petition, which are admissible in some States for the same purpose; and the mortgagee having made his election of remedies is bound by it, even though through his mistake of law and erroneous proceedings it has proved inadequate. The matter is now *res adjudicata* so far as the mortgage lien is concerned. *Jackson vs. Henry*, 10 *John. R.*, 185; *State Bank vs. Wilson*, 4 *Gils. Rep.*, 57, (*Illinois*); 7 *Wheat.*, 432; 7 *J. Ch. Rep.*, 182; 1 *Dana*, 425. 1 *J. Ch. Rep.*, 91; 4 *Minnesota Rep.*, 33, 35.

II.—The mortgagee acts as trustee for both parties in executing the power in the mortgage. Now can he by reciting his own acts, so illegal and prejudicial to the rights of the mortgagor (one of the *cestui que trust*,) as to cause the execution to be set aside, thus show equities in himself and acquire rights by his own wrongful (it may have been fraudulent) acts and breach of trust?

III.—The mortgagor's rights in a case like this (if he has any,) are against the Sheriff who acts as his agent and not against

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the land—or he must recover upon his personal securities and acquire a new lien by docketing his judgment; and if the land has been conveyed meantime wrongfully, such conveyance may be set aside for constructive fraud, &c., &c. This course is expressly prescribed in some States (against Sheriff.)

IV.—Two if not three causes of action are improperly united in the complaint, and judgment is demanded upon each and all of them. *Van Santvord's Pl., p.* 342 *to* 349, *passim*; *Gould's Pl., ch.* IV, *secs.* 2, 3, 4, &c; *8th Amer. Ed. Chitty*, 226, *&c.*

Points and Authorities of Respondent.

I.—As to the 1st, 2d and 3d grounds of demurrer—these claim in effect that the prior foreclosure by advertisement, although void, extinguished the mortgage, and therefore the Plaintiff has no cause of action.

It is well settled that a mortgage must be actually void to extinguish it, and inasmuch as the Plaintiff neither received payment in money or property his mortgage still subsists; a void foreclosure is neither payment nor extinguishment of the mortgage. *Jackson vs. Slater*, 5 *Wend.*, 295; 1 *Hill. on Mort., chap.* 17, *sec.* 5, *p.* 449; *Hough vs. De Forest*, 13 *Conn.*, 473; *Jackson vs. Bowen & Neff*, 7 *Cow., p.* 13; *Johnson vs. Williams*, 4 *Minn.*, 260, 270; *Sec.* 1 *Barb. Ch. Pr.*, 537 *to* 540.

II.—As to the 4th objection of demurrer—this is not ground of demurrer under the statute. *Peckham vs. Smith*, 9 *How. Pr. R.*, 436.

The complaint states one cause of action in equity, setting up all the facts so that the Court can render a complete decree. 1 *Story's Eq. Jur., sec.* 64 *b, sec.* 64 *l, p.* 80, 81, *sec.* 437 *to* 440, *p.* 466, *&c.*

J. B. Brisbin, Counsel for Appellant.

Horn & Galusha, Counsel for Respondent.

By the Court—Emmett, C. J.—When a mortgage is given to secure the payment of money, it is the debt itself that is

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secured, and not the note or other instrument by which it may be evidenced. Hence the general rule that the lien of the mortgage lasts as long as the debt; and that nothing but actual payment of the debt, or an express release, will operate as a discharge of the mortgage. 1 *Hill. on Mortgages*, 448–9, *sec.* 4.

There is nothing in this case to exempt it from the operation of this rule. The action is brought to foreclose the mortgage, and the mortgagee states in his complaint that the debt still remains unpaid, and that no proceedings have been had at law, save that in the exercise of a power of sale contained in the mortgage, he had sold the mortgaged premises by advertisement, but that the said sale, at the instance of the mortgagor, had been set aside, and declared null and void, by the judgment and decree of the District Court of the proper county.

There is no pretense that any portion of the debt has been paid, or that there has been an express release of the mortgage, but it is insisted that the said sale under the power, though adjudged to be illegal and void, yet operated to discharge the mortgage lien.

We think this proposition was by no means established. No one of the cases referred to in the brief of Defendant's Counsel, seems to us to maintain any such doctrine. They are mostly to the effect—that a judgment creditor, having once sold on execution the interest of the judgment debtor in certain real estate, cannot afterwards redeem the lands under the statute relating to redemption, although his judgment may not be fully satisfied. They all depend more upon the construction of particular statutes than upon any general principle.

The sections of our statute to which we have been referred, seem to establish that the power of sale contained in a mortgage is a "lien or charge" on the land mortgaged, and passes by an assignment of the mortgage. This implies that the "lien or charge" thus created or declared, would not exist, without the statute, or would be lost in case the mortgage was assigned. There is room therefore for distinguishing between this lien or charge, and the lien of the mortgage. The former,

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but for the statute, might be lost by an assignment, although the latter would still exist in favor of the assignee, without a statutory declaration to that effect. But these sections do not aid us in determining what is the only material question in this case, which is, whether the debt remaining wholly unpaid and there being no express release of the mortgage, the mortgage lien does not still exist, notwithstanding an abortive attempt to foreclose by advertisement under the statute. They might throw some light on the question, whether the power of sale could again be resorted to, or could be exercised more than once, but these questions do not necessarily arise in this case. There are decisions in some of the States to this effect, but they are predicated more or less upon the peculiar statutes of those states, and it is believed that none go farther, independent of the statutes, than to assert the principle that property cannot be more than once exhausted, in satisfaction of the same debt. And we might admit the correctness of this general principle, yet it would by no means follow that it would apply to the case of a sale, made in pursuance of a power, which at the instance, and for the benefit of the mortgagee had been set aside and declared null and void, by the judgment of a court of competent jurisdiction. Such a sale could not be said to have exhausted the mortgaged property, or made any application of it, in satisfaction of the debt; because the subsequent adjudication thereon, left the parties in the same condition, in their relations to each other, that they occupied before the illegal exercise of the power was attempted.

As between the mortgagor and mortgagee, the former would have had the right, perhaps, to affirm the sale, and hold the latter personally responsible for any injury he may have suffered thereby. *Lowell vs. North & Carll*, 3 *Minn.*, 32. But he cannot have it set aside, and at the same time have the benefit of an affirmance. It cannot be inadequate to pass even the interest of the mortgagor in the property, and yet sufficient to destroy the lien of the mortgagee. The sale should not be held valid for one purpose, and void for another.

We hold therefore that as the debt secured by the mortgage

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remains unpaid, and the mortgaged property has in no degree been applied to the payment of the debt, the lien of the mortgage exists, notwithstanding the illegal foreclosure by advertisement—that having been set aside by the judgment of a court of competent jurisdiction, at the instance of the mortgagor.

The judgment of the District Court overruling the demurrer of the Defendants to the complaint, is affirmed; and as there are infant Defendants, whose interests may not be sufficiently protected without a trial, we will remand the case to the District Court, for such further proceedings, as may appear to be necessary.

MARY G. WORLEY and ADAM WORLEY, her husband, Appellants, *vs.* ALEXANDER NAYLOR, ULYSSES NAYLOR, ARCHIBALD McCLURE, Executor, &c., and LORENZO M. BOARDMAN, Sheriff of Nicollet County, Respondents.

APPEAL FROM THE DISTRICT COURT OF NICOLLET COUNTY.

In a foreclosure of mortgage by advertisement, the notice was first published August 3d, and published successively once in each week up to and including September 14th, the day of sale—*Held*, a sufficient publication under the statute.

The mortgaged premises consisted of four hundred acres of land, lying in three different sections, and in two distinct townships. Three hundred and twenty acres lay contiguous and in one body, and eighty acres, separated from the former by intervening lands, and also in one body. The three hundred and twenty acre tract was sold in one parcel, and the eighty acre tract in another. *Held*, that there was no error in selling in this manner, and that the mortgagee was not obliged to offer the lands in government subdivisions, nor in as small subdivisions or parcels as were described in the mortgage.

In this cause a jury trial was waived by the parties, and the following is the finding of the Court, upon which judgment was entered for the Defendants:

The above entitled case was brought on for trial at a reg-

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ular term of said Court, held at the court-house in the town of St. Peter, in said county, on the first Monday of June, A. D. 1861. The parties by their counsel waived a trial by jury, and the case was tried by the Court, and having heard the proofs and allegations of the parties, and the argument of counsel, I find the following as the facts and the law in the case:

On the 13th day of July, A. D. 1858, the Plaintiff, Adam Worley, made and delivered to the Defendants, Alex. Naylor and Ulysses Naylor, his promissory note in writing, whereby he agreed to pay to the said Defendants, Alex. Naylor and Ulysses Naylor, or to their order, the sum of fifteen hundred dollars, twelve months after the date thereof, and at the same time, and to secure the payment of the said note, the Plaintiffs, Mary G. Worley and Adam Worley, executed and delivered to the Defendants, Alex. Naylor and Ulysses Naylor, a mortgage deed conveying the south half and the northeast quarter of the south west quarter, and the southwest quarter of the southeast quarter of Section number thirty-three, in Township number one hundred and ten, and the northwest quarter of Section number four, and the south half of the northeast quarter of Section number ten, in Township number one hundred and nine, all being in Range number twenty-seven, west of the 5th principal meridian.

That on the 13th day of July, Defendants, Alex. Naylor and Ulysses Naylor, for a valuable consideration, assigned the said note and the said mortgage to one Nathaniel Wright, as collateral security for a sum of money loaned by the said Wright to the Defendants, Alex. Naylor and Ulysses Naylor; that on the 15th day of July, 1859, default having been made in said mortgage, the said Nathaniel Wright proceeded to foreclose said mortgage by virtue of a power of sale therein contained, and under and by virtue of the statutes of Minnesota providing and regulating the foreclosure of mortgages by advertisement; that a notice of such foreclosure and of the sale thereunder of the said mortgaged premises was published in the Saint Peter *Free Press*, a newspaper printed and published in said county of Nicollet, and that the said notice specified the names of the mortgagees and of the mortgagors,

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the assignment of the said mortgage, and the assignee thereof, the said Nathaniel Wright, the date of the said mortgage and the time and the place of the record thereof, the date of the said assignment and the time and the place of the record of the same, the amount claimed to be due and which was then actually due on and by virtue of the said mortgage and the said note thereby secured, at the date of said notice, a full description of the mortgaged premises, conforming to the description of the said land as described in the said mortgage, and the time and place of the sale of the said premises, namely: at the office of the Register of Deeds of said county of Nicollet, on the 14th day of September, A. D. 1859, at 3 o'clock in the afternoon of that day; that the said notice was published in the said paper for the first time on the 3d day of August, A. D. 1859, and was so published for each week successively up to, and including, the 14th day of September, of the said year, on which day the sale was made. The paper in which said notice was published was printed on publication day about noon, and deposited by the publishers in the post office in the town of Saint Peter, about tea time of same day, but occasional numbers of the paper were delivered on publication day to town subscribers who came into the office prior to the time of deposit in the post office, and shortly after the paper was printed. The land described in the mortgage lay in three distinct sections, and in two distinct townships. The south half of the south-west quarter, and the northeast quarter of the southwest quarter, and the southwest quarter of the southeast quarter of section number 33, township number 110, range 27, west, was deeded by Alex. and Ulysses Naylor to the Plaintiff, Mary G. Worley. The northwest quarter of section number 4, township number 109, range 27, west, was deeded by Ulysses Naylor to plaintiff, Mary G. Worley. The south half of the northeast quarter of section number 10, township number 109, range number 27, west, was deeded by Alex. Naylor to the Plaintiff, Mary G. Worley. All the land described in the mortgage, except the south half of the northeast quarter of section 10, township 109, range 27, west, lay contiguous and in one body, and was on the day of sale offered and sold as one tract.

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The eighty acre tract last above described was by the sheriff on the day of the sale, sold separate from the rest, and was by him sold as one tract or parcel of land. All the land described in the mortgage was on the day of sale, to-wit: on the 14th day of September, 1859, at the hour of 3 o'clock in the afternoon, by the Defendant Boardman, sheriff of said county, so sold at public auction to the highest bidder.

The said Nathaniel Wright was the highest bidder at said sale, and the land sold as aforesaid, was sold to him, and the said sheriff executed to him a certificate of sale for the same.

I find as questions of law in the case, as follows: The assignment of the note and the mortgage from the Defendants Alex. and Ulysses Naylor was sufficient in law to authorize the foreclosure of the mortgage as against the Plaintiff, and there is no reason on their account for setting aside the sale.

The publication of the notice, first on the 3d day of August, 1859, and successively each week up to and including the 14th day of September of the same year, was a good notice under our statute. Such publication furnishes notice for six successive weeks of the sale of the mortgaged premises, and most unquestionably, under the rule for computing time as furnished us by the *43d sec. of chap. 72, Comp. Stat., p.* 630, the notice is full and complete.

It is not necessary under our statute in sales by foreclosure of mortgages by advertisement, that the sheriff should necessarily sell each legal subdivision separately. This may or may not be the case. The land included in this mortgage consists of two separate tracts, and were so sold, and the sale in this respect is regular. I see no reason why the sale in this case is not strictly within the spirit and letter of the law, and it should not therefore be disturbed by this Court. The relief prayed for by the Plaintiff must be denied, and judgment ordered for the Defendants for their costs snd disbursements, and it is accordingly so ordered.

Points and authorities of Appellant.

I.—There was not sufficient notice of the sale on foreclosure. *Comp. Stat.*, 644; *How. N. Y. Code*, 428; 20 *Barb.*,

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148; "*Sales on Execution*," *Comp. Stat.*, 572; 5 *Wen.*, 127; 1 *Cow. Treat.*, 295; 2 *Story*, 571; 3 *Greenleaf*, 188; 23 *Pick.*, 93; 22 *Pick.*, 571; 9 *Wheat.*, 381; 1 *Pick.*, 485; *Jacobs vs. Graham*, 1 *Black.*, 392; *Arnold vs. U. S.*, 9 *Cranch*, 104; 4 *N. H. R.*, 267; 3 *Penn.*, 300; 11 *Mass.*, 85; *Wiggins vs. Peters*, 1 *Met.*, 127, 129; 1 *Pick.*, 485; 1 *Cow. Treat.*, 295; 5 *Wend.*, 137; *Per Spencer, J, in Jackson ex dem. and Gardiner vs. Clark and another*, 7 *Johns. R.*, 224; *Barb. Sup. Ct. R.*, 119; *Johns. R.* 232; *How. N. Y. Code, p.* 428; 20 *Barb.*, 148; 2 *Mon. Pr., p.* 105; see also analagous cases, 1 *How.*, 77; 8 *Cow.*, 260; *Voorhees N. Y. Code*, 5*th Ed.*, 385, 4*th Ed.*, 344; see also 6 *Cow. Rep.*, 659; *How. N. Y. Code, p.* 628; 11 *How. R.*, 193; *How. N. Y. Code, p.* 428; 20 *Barb.*, 148; 5 *Wen.*, 137.

II.—The premises were not sold in separate parcels.

In sales under execution the same provisions are embodied as to the sales of distinct tracts. See *Comp. Stat.*, 572, the language being, "known lots or parcels." See also *Voorhes Code*, 4*th Ed., p.* 433. See also *Rules N. Y. Sup. Ct., Rule* 50, *p.* 672; *Voorhes Code* and *How. N. Y. Code, p.* 715, *Rule* 74; *By the Chancellor, Kent, in* 1 *Johns. Ch. R.*, 504; *The Am. Ins. Co. vs. Oakley and others*, 9 *Paige, Ch. R., p.* 262; 2 *N. Y. Rev. Stat.*, 369, *sec.* 38; 13 *How. Pr. R.* 556; 16 *How. Pr. R.*, 417; 8 *Am. Cr. L.*, 139, and cases there cited; 2 *Whit. Pr.*, 385.

Points and Authorities of Respondent.

I.—The inquiry seems to be simply this: is this case within the rule prescribed for "the publication of legal notices." *Comp. Stat.*, 630, *sec.* 43, or is both the first and last day of publication to be excluded, and if so, under what rule?

"The time for publication of legal notices must be computed so as to exclude the first day of publication, and to include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication."

This statute is general, is not a clause general in its language alone, while a part of an act relating to a particular

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subject matter, and that not the subject matter under which the controversy arises; but it is among the miscellaneous, the general, the universal, the catholic provisions of the statute. And here I remark that it matters less whether the mortgage has one day more or one day less, than that we have certainty and uniformity in our rules governing titles and the trade and commerce of the country. If this rule does not govern the right of action on a promissory note, a suit not being maintainable on the last day of grace, or the treaty rights of nations, it is simply because the former is within the law merchant, and the latter regulated by the treaty laws and usages of nations, instead of being within the statute provided by the legislative branch of the Government as to "the time for publication of legal notices."

As to our case being sufficient under the rule, the attorney for the Appellants has never denied. The "act or event of which notice is given" mentioned in the last clause of that section is the sale in this cause, and the day on which that was advertised to "happen," or transpire, is to be included in the computation, having excluded the day of the first publication. The day on which the event noticed is to "happen," in order to be computed, must be within the final adjunct of the clause quoted, "or which completes the full period required for publication." Now, what day completed the six weeks for which the law required us to publish the notice? The forty-second day of the publication, of course, which would have been the thirteenth, instead of the fourteenth day of September, on which we sold, did the law entitle us to every day that our notice was before the world, but as it excludes the first day of publication from the computation, it pushes us along one day, and the fourteenth day of September is required to complete the full period of six weeks or forty-two (42) days. And this is not only within the statute prescribing the rule of computation of time, but also *Section* 4 of the act providing for the foreclosure of mortgages by advertisement, *p.* 644. For under this section the question what is six weeks, carries us back to the rule of computation, and whether measured by the statute or the calendar, the result is the same. If the Appellants insist that the statute re-

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quires six weeks before and exclusive of the day of sale, thus taking the case out of the rule, I can with equal propriety insist that since they have taken the cause out of the rule, the first day shall be counted, as it is excluded only by the rule. Such measure as they mete unto us, by the same rule must they allow us to measure their rights; they cannot cut off one end of the rule and still insist that their opponents are bound by the other end.

Then, again, *Section* 4 does not provide that there shall be six weeks of publication before nor exclusive of the day of the sale, but silently leaves it subject to the general rule. And it has been decided that where the word "before" was used, the rule still prevailed. Thus the *Code of Procedure of New York*, like our own, provides that notice of trial shall be served "at least ten days before the court." *N. Y. Code, sec.* 256; *Comp. Stat.*, 558, *sec.* 8. Yet it has been uniformly held, whenever the question has arisen, that the first day of the Court was to be counted. *Dayton vs. McIntyre*, 5 *How. Pr. R.*, 117; *Easton vs. Chamberlain*, 3 *How.*, 412; *Phelan vs. Douglas*, 11 *How.*, 193; *Howard's N. Y. Code*, 629; *Westgate vs. Hamlin*, 7 *How.*, 372; 2 *Whittaker's Pr.*, 339; *Small vs. McChesney*, 3 *Wend.*, 19; See also 4 *Com.*, 418; 3 *Denio*, 263.

II.—The second objection to the validity of the sale, is, that the lands were sold in but two parcels, whereas they consist of more than two "farms, tracts or lots." That it appears as a matter of fact, that the lands lay in but two distinct tracts, while they really constitute but a single farm. Though originally pre-empted by several persons, they were all purchased by Adam Worley for one purpose—for one farm; the larger tract for agriculture, the smaller for wood or timber land. The reconveyance by mortgage was in a single instrument, and all one transaction.

We hold the sale under such circumstance a strict compliance with the letter of the statute.

There has been some diversity of opinions and of decisions in this question, but it has been so settled for most of the Western States, and expressly for Minnesota. *Tillman et al. vs. Jackson*, 1 *Minn. R.*, 183; 9 *Ohio*, 19; *Groff vs. Jones*, 6

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Wend., 522; *Wood vs. Monell*, 1 *John. Ch. R.*, 502; 5 *Barb.*, 626; 4 *Wheat.*, 503; 3 *Bibb.*, 216; 1 *Burnell's Pr.*, 301.

Comp. Stat., *p.* 644, *sec.* 8, is identical in legal effect with *Sec.* (112), *p.* 572, regulating sales on execution.

THOMAS COWAN, Counsel for Appellants.

HORACE AUSTIN, Counsel for Respondents.

By the Court—ATWATER, J.—This was an action brought by the Appellants to set aside a sale of certain real estate, upon a foreclosure of mortgage by advertisement. The cause was tried by the Court, and judgment rendered for the Defendants, from which they appeal to this Court.

Two objections are made by the Plaintiffs to this sale. First—that the notice of sale was not published the length of time required by statute; and second—that the land was not sold in separate parcels, or tracts, and is therefore invalid. With regard to the first point, the Court below finds that the notice of sale was published in the Saint Peter *Free Press*, a newspaper published in Nicollet County, in which the mortgaged premises were situated; "that the said notice was published in the said paper for the first time on the third day of August, A. D. 1859, and was so published for each week successively up to, and including the 14th day of September of the said year, on which day the sale was made. The paper in which said notice was published, was printed on publication day about noon, and deposited by the publishers in the post office in the town of Saint Peter, about tea time of same day, but occasional numbers of the paper were delivered on publication day to town subscribers, who came into the office prior to the time of deposit in the post office, and shortly after the paper was printed."

The statute governing the publication of legal notices, is found on *p.* 630, *Comp. Stat.*, *sec.* 43, and provides that "the time for publication of legal notices must be computed so as to exclude the first day of publication, and to include the day on which the act or event of which notice is given is to happen, or which completes the full period required for pub-

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lication." This is a general provision applicable to all cases not otherwise specifically provided for. *Sec.* 4 *of p.* 644, *Comp. Stat.*, provides that notice of sale shall be given by publishing the same for six successive weeks at least once in each week, but does not define precisely how the time shall be computed; providing however, that the publication shall be at least six weeks. Applying the rule above quoted to this case, it appears that the notice was published six weeks, as required by statute. Excluding the 3d day of August, the day of the first publication, and including the 14th day of September, the day of the sale, makes forty-two days, or six weeks of seven days each. The notice was in fact published seven times, once more than was requisite. The day which completed the full period required for publication was the forty-second, excluding the first, and that day is to be included in the computation, as that on which the "act" or "event," of which notice is given is to happen, that is, the sale in the cause. We know of no rule on which it can be contended, that both the first and last days of publication are to be excluded, in computing the six weeks, where the last publication is on the forty-third day from the first. It will be observed that *Section* 4 above referred to, does not provide that there shall be six weeks before, or exclusive of the day of sale, but leaves the computation to be controlled by the general rule. But even in cases where this word is used, it has been held that the day on which the act is to be done, or event happen, is to be included. *N. Y. Code*, *sec.* 256; *Comp. Stat.*, *p.* 558, *sec.* 8; 5 *How. Pr. R.*, 117; 3 *How.*, 412; 11 *How.*, 193. And where, under the law of New York, personal notice of the sale was to be served on the mortgagor, fourteen days before the sale, a service on the first for the fifteenth was held good. *Westgate vs. Handlin*, 7 *How.*, 372. As the statute has specifically provided for the computation of time in these cases, that must govern, and it is unnecessary further to discuss the bearing of decisions in analagous cases, but under different statutes or rules of court.

With regard to the second objection, the facts found by the Court are substantially as follows: that "the land described in the mortgage lay in three distinct sections, and in two dis-

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tinct townships. The south half of the southwest quarter, and the northeast quarter of the southwest quarter, and the southwest quarter of the southeast quarter of section number 33, township number 110, R. 27 W., was deeded by Alexander and Ulysses Naylor to the Plaintiff, Mary G. Worley. The northwest quarter of section number four, T. 109, R. 27, W. was deeded by Ulysses Naylor to Plaintiff, Mary G. Worley. The south half of the northeast quarter of section No. 10, T. 109, R. 27 W., was deeded by Alex. Naylor to the Plaintiff. All the land described in the mortgage, except the south half of the northeast quarter of section 10, T. 109, R. 27 West, lay contiguous and in one body, and was, on the day of sale offered and sold as one tract. The 80 acre tract last above described was, by the Sheriff, on the day of sale, sold separate from the rest, and was by him sold as one tract or parcel of land."

The Appellant claims that the premises were not sold in "separate parcels," as required by Statute, and that they should have been offered and sold according to government legal subdivisions. The land was offered and sold in two parcels, one of 320 acres, and one of 80 acres.

Sec. 8, *of page* 644, *Comp. Stat.* provides that "if the mortgaged premises consist of distinct farms, tracts or lots, they shall be sold separately, and no more farms, tracts or lots shall be sold than shall be necessary to satisfy the amount due on the mortgage at the date of the notice of sale, with interest, and the costs and expenses allowed by law."

In regard to the first parcel of 320 acres, the complaint alleges that "the said land being in four separate and distinct subdivisions, tracts or lots, and being two distinct farms." Whether the premises consisted of two or more distinct farms or tracts, was a matter to be determined by the evidence. All that appears upon the subject, in the case presented to this Court, is in the finding of the facts by the Judge who tried the cause, who states that the same "lay contiguous and in one body." It is admitted, however, that the same lay in different townships and sections. The question, therefore presented is, whether the Sheriff was bound to offer the premises

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for sale by government subdivisions, or in as small subdivisions or parcels as are described in the mortgage.

We cannot think it was intended by the Legislature to give the Statute above quoted as limited a signification as is claimed for it by the Appellant. The language must be taken in its ordinary acceptation ; and the meaning of the word farm, as given by Webster, expresses, perhaps, the popular idea, as correctly as any other that could be given. He defines it as "a portion or tract of land, consisting, usually, of grass land, meadow, pasture, tillage and woodland, cultivated by one man, and usually owned by him in fee." It could scarcely be claimed that because such a body of land might be made up of land laying in different sections, or even townships, that such parcels constituted "distinct" farms, either within the purview of the statute, or in any manner whatever. Nor would the fact, that such body of land had been acquired from different owners, make distinct farms of the parcels in the hands of the purchaser. The object with which a body of land is held by the owner or occupant, the manner of its use, and the conveniences attaching to it for farming purposes, would be circumstances entitled to far more weight in determining whether it is to be considered as one farm, than imaginary lines drawn by government for its convenience in disposing of the land. The use of the term "distinct," in this connection, must mean a separation, by some natural means or boundary, or by intervening space, and not simply a portion which may be described by arbitrary imaginary lines. Clearly so, as applied to farms, since no farmer, having under improvement a body of land composed of different subdivisions lying contiguous, ever speaks of them as different farms. And if such be the construction as to the word "farms," it must equally apply to the word "tracts," used in the same connection, and having reference to the same subject matter. If by the terms employed in this section, the Legislature intended that the farms or tracts of which the mortgaged premises consist, should only be sold according to the legal subdivisions recognized by government, they have adopted language but poorly calculated to convey their meaning, when the most apposite terms would seem ready at hand. By the

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use of the word lots, I understand to be meant town or city lots, which, in conveyancing and sales, are usually described by their numbers upon a recorded plat.

In a statutory foreclosure, the aid of a Court of Equity is not invoked, and the object of the Statute regulating these sales, is to have them fairly made, and as nearly in accordance with the principles established by Courts of Equity in like cases as may be. It is a well settled and familiar principle with these courts, that the mortgaged property shall be so disposed of as to bring the best price possible, consistently with the preservation of the rights of the mortgagee; but there are no arbitrary and inflexible rules requiring property to be offered and sold in legal subdivisions, or in any particular parcels or quantities. Each case must depend upon its own particular circumstances, and where any question is made as to the proper method of sale, the Court will order proofs to be taken, in order to give directions as to the disposition of the property. In the case at bar, unless the Statute itself requires the premises to be sold in legal subdivisions, the Plaintiffs fail to make out a case for the interference of this Court, since the allegations of the bill are not sufficiently definite and specific in showing injury sustained by the sale as it was actually made; nor has the defect been supplied by the proof. Even where a sale is made in accordance with the provisions of statute, circumstances may exist entitling the mortgagor to relief, and where these are made clearly to appear, a Court of Equity would be justified in interfering to protect the interests of the mortgagor. But such a case is not here presented, and the judgment below must be affirmed.

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THE CHASKA COMPANY Appellant, *vs.* THE BOARD OF SUPERVISORS OF CARVER COUNTY, Respondents.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

The Board of Supervisors of Carver county issued thirteen bonds of said county to the Chaska Company, for the purpose of negotiation, the proceeds to be used in the erection of a Court House. The Company sold one, and hypothecated four others. In an action by the Company against the county, to recover the value of materials and services in the erection of the Court House, *Held*, that the Plaintiff was not estopped from showing that the bonds were of no value.

At the time these bonds were issued, County Commissioners were authorized to issue bonds for the purpose of erecting a Court House and jail, and the bonds are valid and binding upon the county.

The following is the finding of the Court below, upon the issues of law and fact:

This cause came on to be heard and a jury trial being duly waived the same was submitted to the Court for trial and determination. And now having considered the allegations and proofs of the parties, I find the following facts, to-wit: That the said Plaintiff by virtue of an act of the Legislature of the State of Minnesota, approved on the 7th day of March, A.D. 1857, became and still is an incorporated company, and was duly organized by the the election of proper officers according to the provisions of the said act of incorporation; that afterwards the said Plaintiff acting within the scope of the powers conferred by the said act and in pursuance of its legitimate business, at the special request of the said county of Carver by their legally authorized agents the Board of County Commissioners, entered into an agreement to furnish to said Defendant certain moneys, goods, wares and merchandise to be used in the erection of certain County Buildings within and for said county of Carver upon the following terms and conditions, to-wit: That in consideration that said Defendant would make, issue and deliver to said Plaintiff thirteen bonds for the sum of $1,000 each, payable to one George Fuller or bearer, as follows, to-wit: four of said bonds payable on the first day of July, 1863; two of said bonds payable on the first day of July, 1864; two of said bonds payable on the

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first day of July, 1865; two of said bonds payable on the first day of July, 1866; and the remaining three of said bonds payable on the first day of July, 1867, all bearing interest at the rate of twelve per cent. payable semi-annually on the first day of January and July in each year, with interest coupons attached, at the office of Duncan, Sherman & Co., New York City. That the said Plaintiff would furnish, advance and pay over to said County Commissioners upon demand and in such sums and quantities and at such times as were necessary to the successful prosecution of the work, all the moneys and materials with which to build, furnish and complete in a suitable and perfect manner certain buildings in said county of Carver, to be used and occupied by said county for Court House and Jail, according to certain plans and specifications before and at that time mutually agreed upon. The said Defendants on or about the first day of July, 1857, did make, issue and deliver to said Plaintiff said thirteen bonds of the denomination and payable at the times aforesaid, which were received and accepted by said Plaintiff in full performance of said agreement by said Defendant. That in consideration of the delivery of said thirteen bonds as aforesaid, and as a further assurance to the performance of said agreement by said Plaintiff, the said Plaintiff did agree to negotiate said thirteen bonds for the benefit of said county, and pay over the proceeds thereof upon the order of said County Commissioners, and did enter into a written obligation in the sum of $20,000 to perform said last mentioned agreement as set forth in said answer. That afterwards and in pursuance of said agreements the said Plaintiff did at the times stated in said complaint advance and furnish to said Defendants moneys and materials to the amount and value of $7,509.14. That of the items set forth in said schedule attached to said complaint there was excluded from the amount aforesaid as not proved, sums amounting in all to $2,489.70. I further find that of said thirteen bonds received by said Plaintiff as aforesaid, the said Plaintiff has sold one for $900, and has hypothecated and pledged four others to various parties for the purpose of receiving money, and while said four bonds still remain so pledged—that said remaining eight bonds

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are in the possession and under the control of said Plaintiff, not negotiated or disposed of; that said Plaintiff has never offered to return to said Defendants any of said bonds, and said Defendants have never made any formal and proper demand or any demand whatever for the return of the same. That no interest has ever been paid upon said bonds by said Defendants although the same has long since become due and has been often demanded. That after the month of November, 1858, no money or materials were furnished by said Plaintiff for the building and completion of said county buildings, nor was there any demand for money or materials made of said Plaintiff after said month of November, 1858. That said county buildings remain unfinished and not in condition to be used and occupied by said county, and have not been nor are they now so used or occupied. As conclusions of law I find the following to-wit: that it was the duty of said Plaintiff to negotiate said thirteen bonds within a reasonable time after receiving them on the best terms possible, and account to said Defendants for the proceeds thereof. That until said thirteen bonds are negotiated as aforesaid and said Plaintiff is ready to account for the proceeds thereof, or until it appears that said bonds cannot be negotiated and were offered to be returned to said Defendants, the said Pl intiff has no right of action against said Defendants to recover the moneys advanced and the value of the materials furnished under the agreements aforesaid. That having sold one of said bonds and hypothecated four others to secure the payment of money borrowed, the said Plaintiff is estopped from charging or showing that said bonds are of no value. That said Defendants not having demanded since November, 1858, that said Plaintiff furnish any further moneys or materials for the completion of said buildings, and not having demanded the return of said bonds or any of them, is not entitled to claim the value of the same as an offset in this action. That upon the facts found as aforesaid the said Plaintiff is not entitled to maintain this action nor the Defendants to obtain judgment upon the counter claim as set up in said answer. Whereupon it is adjudged that this action be dismissed.

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Points and Authorities for Appellants.

I.—The agreement of May 23, 1857, is void *ab initio* for a total want of consideration; the thirteen bonds being issued contrary to law and of no binding force upon the county of Carver. But the purpose was legal and proper; see *Rev. Stat., p.* 153, *sec.* XII (5); but whether good or not,

II.—The agreement of the first of July, 1857, and evidenced by the penal bond, operates as a rescision of it (the one of May 23, 1857), because the company thereby agree and bind themselves to pay over to the county the proceeds of the thirteen bonds, which proceeds constituted the only consideration of the contract of May 23, 1857, and is therefore inconsistant with it. See *Chitty on Contracts, p.* 741, also *note u.*

III.—The parties probably did not intend that result, as is shown by the penal bonds bearing actual date May 20th, 1857; thus proving that the original intention of the parties was that the company should receive the thirteen bonds as mere agents for the disposing of and accounting for the same, and not as payment or consideration or a satisfaction for the advancement of the money, &c. However, the effect is the same whether the two instruments evidence one contract or two; the one of July 1st, (May 20th,) nullifies the other, it being a bond to refund the consideration of the other. Therefore,

IV.—The promise to advance means for the building of the county buildings was without consideration and void.

V.—The claim for recoupment is illegal in this. The company are not liable for ceasing to furnish their means upon a void promise; and (2) they did not promise to furnish except on demand, and the Court below find no such demand.

VI.—The counter claim for the face of the thirteen bonds is illegal, because first, they are nullities void upon their face and of no value to the county. *Story's Eq., Jur., 2 vol, sec.* 700 *a*; *Sedgwick on Damages*, 488. They are not *prima facie* worth $13,000, but are void on their face; second, there has been no conversion of them alleged or found. There can be no conversion of the thirteen bonds without a breach of the penal bond, and there can be no breach of the penal bond

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unless an order of the county board for the proceeds drawn upon the company has been presented for payment and payment refused, but no such order or any demand is found by the Court below.

VII.—Therefore the advances being made under a "*nudum pactum*;" and the claim for recoupment being illegal, and the counter claim both a nullity and premature, the Plaintiff is entitled to the amount proved under the complaint, to-wit: $7,509.14, or a new trial. 8 *Cow.*, 20, 24; 2 *Bosanquet & Puller's Rep.*, 466; 7 *Mass.*, 14, 31; 6 *Mass.*, 81; 22 *Pick.*, 181; *Chitty on Contracts, p.* 624–5.

The finding of the Court below contrary to the pleadings is error of law, a mere misconstruction of the pleadings and contracts.

VIII.—The Plaintiff is not estopped to deny the validity of the thirteen bonds, either by deed or matter "*en pais*;" not by deed, for in neither contract (only the bond is a "deed,") is the validity of the bonds, or any facts showing their validity alleged, so as to render the company liable either at law or equity to the county in an action of covenant or for deceit or for fraud or otherwise. See 13 *Wend.*, 178, 205-6-7-8, (a leading case); *Coke upon Litt.*, 352. The penal bond recites that the Board had directed the issuing of the thirteen county bonds, but it does not recite that they had the power or legal ability to issue them; nor that they were valid evidences of county indebtedness, when issued; and estopples "must be a precise affirmation of the matter which maketh the estoppel;" it cannot be taken by argument or inference. See *Co. Litt.*, 352 *a* (*ante*). Secondly—the county (this Defendant) is not a party to these instruments or either of them, and unless the county ratifies the transaction (which by law they have not the power to do) it cannot insist upon an estoppel by reason of anything therein. An estoppel by deed only exists between privies.

Not by matter "*en pais*," for the pleadings do not show or admit, nor does the Court below find, that the company made any representation either by word or act, upon which the county have acted or been induced to alter its condition, so that the county could now recover for deceit or fraud, actual

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or constructive. See cases *ante*. 3 *Hill.*, 321-2; *DeZill vs. Odell, Cow. & Hill.*, 200.

The company are not estopped by the selling one of the bonds and the hypothecation of four others, unless the county have thereby become liable to the holders for their face. If the company are estopped, it is solely to prevent a circuity of action and a multiplicity of suits, which reason cannot apply unless the county is thereby made liable. But it is not liable for there cannot be a *bona fide* holder of these bonds. They are void upon their face and they carry with themselves notice to every person dealing with them; the law of this State shows their nullity. It would be otherwise were they void for some secret unseen defect (fraud, usury, &c.,) requiring *aliunde* proof. See cases before cited.

Points and Authorities for Respondent.

I.—The agreement on the part of the County Commissioners (the Defendants) to issue and deliver to the Plaintiff $13,000 in County Bonds, and the agreement on the part of the Plaintiff, that in consideration of the issuing and delivery to them of the bonds, the Plaintiff would advance, furnish and pay over to the Defendants in such sums, and at such times, as were necessary, all the moneys and materials with which to build, finish and complete in a suitable and perfect manner a Court House and Jail, according to certain plans and specifications, before and at the time mutually agreed upon, and the agreement by the Plaintiff to receive and negotiate the bonds for the benefit of the county, and to pay over the proceeds thereof upon the order of the County Commissioners was one and the same contract, which must be taken and considered together, as an entirety.

II.—The Defendants fully performed their part of the contract, by the issuing and delivery of the bonds, and the Court below so find as a conclusion of fact.

The Plaintiffs failed and neglected to perform their part of the contract, in not furnishing the necessary means to finish and complete the buildings, and the Court below so find the facts, and being in default for not performing on their part,

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they cannot recover for the advances they have made under the contract.

III.—The Plaintiff agreed to accept and did accept the Trust of receiving and selling the bonds for the County, as the Trustees and Agents of the county, and they are estopped in law, upon the facts of the case from denying the validity of the bonds.

IV.—It was the legal duty of the Plaintiff, after receiving the bonds from the county, to use all necessary and proper means and diligence to effect a sale of them, as they had assumed and agreed to do; if after using proper diligence for that purpose they could not be sold, then the Plaintiff was legally bound to return the bonds, or if sold, to account for them and pay over the proceeds to the county, within a reasonable time, and having failed and neglected to do either for the space of four years, they are clearly liable for the amount of the bonds.

V.—The Defendants were entitled to be allowed on the trial for the face or par value of the bonds, and the interest accrued thereon from their date, because there was no evidence given, or offered upon the trial, to show that the bonds were not worth their face, and the presumption of law is that they were, until the contrary is proved.

VI.—The Court below having found the facts that the Plaintiff had sold one of the bonds, and hypothecated and pledged four others as collateral security upon which they had borrowed money on their own account, that the same remain so pledged, and that the Plaintiff continues to hold the remaining eight bonds, and have often demanded the payment of the interest upon them, it is a conversion in law and in fact, by the Plaintiff, of the whole amount of the bonds to their own use, and upon which they are liable to the Defendants for the amount, and after such conversion are estopped from questioning the legality of the bonds.

VII.—The bonds of the county issued and delivered to the Plaintiff, are a proper set-off and legal counter claim to the Plaintiff's demand in the action, and is made so by statute. *Comp. Stat., p.* 541, *sec.* 71; *Act of March* 5, 1853, *page* 4, *secs.* 5, 6.

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VIII.—If the Defendants were not entitled to recover the whole amount of the bonds, they are clearly entitled to judgment against the Plaintiff upon the facts found in the case for the balance of the amount of the bonds and interest, after deducting the amount $7,509.14 which the Court below found had been advanced and furnished by the Plaintiff to the Defendants under their contract, and this Court will render such judgment as they find from an examination of the record ought to have been rendered in the Court below. See 18 *N. Y. Rep., p.* 453, *Day vs. Rath*, and authorities there cited. 1 *Story's Eq. Juris., sec.* 323; *Same Book, secs.* 466 *and* 468, *and notes*; 2 *Story's Eq. Juris., secs.* 1268, 1275 *and* 1276.

As to the rule of estoppels, see 3 *Hill. p.* 215, *Dezell vs. Odell*; See also 16 *N. Y.*, 339, *Decker vs. Judson;* 11 *N. Y.*, 102, *Plank Road Co. vs. Thatcher*; 10 *N. Y.*, 303, *Palmer vs. Smith*; 8 *Pick.*, 386, *Cutter vs. Dickinson*; 4 *Pick.*, 219, *Dixall vs. Leadbetter*; 7 *Ind. R.*, 207; 15 *Ind.*, 26, 57, 395.

The question of the validity of these bonds is not involved at all in the issue of fact in the case, and the allegation in the Plaintiff's reply that the bonds were issued without authority and are illegal, presents no issue of fact; it is simply a statement of the pleader's legal opinion, a conclusion of law, and the question cannot be raised and litigated in that collateral manner.

The right to litigate the validity of the bonds belongs to the holders and they alone can rightfully exercise it. It is a subject for adjudication when the holders seek to enforce the payment of the bonds by action, if they are not paid without. But the rights of the holders ought not to be concluded or affected, by making it a collateral question for adjudication in this case, and cannot properly be.

In relation to the amount and value of the bonds as a counter claim set up in the answer, there is but one rule of damages applicable to the facts of the case as they appear in the pleadings and are found by the Court below.

The Defendants are clearly entitled to have allowed them the face or par value of the thirteen bonds with the interest they bear of twelve per cent. per annum. The law holds that they are *prima facie* worth their face in the absence of any

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evidence to the contrary; and no evidence was given on the trial or attempt made to show that they were worth less, or to reduce value, and the finding of the Judge is entirely silent upon that point. Nothing in the report of the Judge is said about their value. Therefore the presumption is that they are worth the sum expressed on their face. See *Sedgwick on damages, p.* 488; 1 *Cow. Rep., p.*240, *Inyalls vs. Lord*; 2 *Rawle Rep., p.* 242, *Roming vs. Romig*; 2 *Kernan*, (*N. Y.*,) *p.* 313, *Decker vs. Mathews*; 2 *Parsons on Contracts, p.* 471.

Therefore, there having been no evidence given or facts found showing that the bonds were worth less than their face, the Defendants are entitled to their full par value, $13,000, with the interest they bear of twelve per cent. per annum, from their date of July 1st, 1857.

Moses Sherburne and Brisbin & Warner, Counsel for Appellant.

M. E. Ames and Smith & Gilman, Counsel for Respondents.

By the Court—Atwater, J.—From the pleadings and finding of the Court in this case we are led to believe that both parties entered into the special contract set up in the answer, in good faith, and each believing the Defendants had legal authority to issue the bonds, which should be binding upon the county. The answer avers the bonds were made, executed and delivered in "due form," and were worth the sum of thirteen thousand dollars. The reply alleges that the Defendants before and at the time of the making of the said bonds, and the delivery of the same, pretended and stated to said Plaintiff, that they were duly authorized by law to execute and deliver said bonds to the Plaintiff, for the purpose of negotiation, and that the same would be of binding force upon the Defendants and upon the county of Carver. But that in fact, said bonds never had any binding force upon Defendants or said county. The validity of the bonds was therefore the principal question of fact at issue. The Defendants seek to escape the liability charged in the complaint, solely on the ground, (so far as appears from the pleadings,) that they have

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complied with their contract, in delivering to the Plaintiff thirteen bonds of the par value of $13,000. This is the consideration which they claim to have paid for the Plaintiff's labor, merchandise, &c., (so much as is admitted or proved,) and if they have not paid this consideration, they do not claim to have paid any, and consequently it would seem, must be held liable for the value of the materials furnished by the Plaintiff.

The question of the validity of these bonds however, has not been decided by the Court which tried the case, the Judge holding, "that having sold one of said bonds, and hypothecated four others, to secure the payment of moneys borrowed, the said Plaintiff is estopped from charging or showing that said bonds are of no value." Upon this point we think the learned Judge who tried the case has fallen into an error. The estoppel spoken of by the Judge in his decision is *in pais*, and if any exist, it must be of that kind, as the pleadings disclose none by deed, or record. For the purposes of this case, the definition of an estoppel *in pais*, as given in *Dazell vs. Odell*, 3 *Hill.*, 219, may be deemed sufficiently accurate, to-wit: that there must be, 1st, an admission inconsistent with the evidence which he has proposed to give, or the title or claim which he proposes to set up; 2d, an action by the other party upon such admission; 3d, an injury to him, by allowing the admission to be disproved. It may be questioned whether any one of these requisites to constitute an estoppel exist in the case at bar; at all events, the last two appear to be entirely wanting. Even if it could be claimed that the disposal of the bonds by the Plaintiff was an assertion by him of their validity and value, to any extent, it does not appear that the Defendant has acted upon or in any respect changed his position in consequence of such admission, and consequently has not been prejudiced by reason thereof. Indeed, from the nature of the case, it would seem that the Defendant could not in any event, be in a position to raise this objection against the Plaintiff, since the bonds originate with the Board of Commissioners, for the very purpose of being negotiated, and if it were possible that the Defendant could be injured by using them for such purpose, it would not lie

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in his mouth to complain thereof. It is unnecessary to inquire at present what position the Plaintiff may occupy with reference to the parties to whom he has sold or hypothecated these bonds, as this is not an action to recover their value as against the Plaintiff. As against the Defendant, the Plaintiff is not estopped from showing that the bonds are without value.

As we hold that the Judge who tried the case committed an error upon this question of estoppel, it becomes necessary to examine the main issue raised in the pleadings,—that of the validity of the bonds issued by the Board of Commissioners of Carver county. As this question has never been passed upon, by the Court below, we might appropriately send the case back, for a finding upon it by the Judge who tried the case. But as counsel have argued the question in this Court, and a decision from this Court is desired upon it, and will probably be necessary for its final determination, it will be examined in this connection.

The validity of these bonds is questioned solely upon the ground, (as we understand the argument of counsel,) that the Board of Commissioners of Carver county had no authority to issue them, and that the county is not liable therefor. No objection is raised that they are not in proper form, nor that if the Commissioners have power to execute such instruments, for the purpose mentioned, it has not been properly exercised. Such, at all events, is the issue raised by the reply, which states in this behalf, that "said bonds were issued without the authority of law, that they have not now, and never had any binding force upon said Defendants or upon said county of Carver, that they are totally void and worthless for any purpose whatever." It is therefore to this question of the authority of the Board of Commissioners to issue these bonds, that our examination will be confined.

It appears from the pleadings and finding of the Court, that the Plaintiff, in consideration that the Defendants would make, issue and deliver to the Plaintiff thirteen bonds for the sum of one thousand dollars each, payable to bearer, at the times specified therein, would furnish all the moneys, materials and labor to build and complete a Court House and Jail

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in and for said county of Carver. And the Court finds that the Defendant did issue said thirteen bonds as agreed upon, and that the same were received and accepted by said Plaintiff in full performance of the agreement by said Defendants. In other words, these bonds were issued and delivered to Plaintiff, in payment of a Court House and Jail, to be erected and completed by Plaintiff, in consideration of such payment.

The powers and duties of County Commissioners are specified in *Sec.* 13, *p.* 153, *Comp. Stat.*, and it is therein provided among other things, that they shall "provide for the erecting and repairing of Court Houses, Jails, and other necessary buildings for the use of the county." No other authority than this is claimed for the action of the board in issuing these bonds, as no special act of the Legislature was ever passed, authorizing the issue thereof. It will be observed that the section above mentioned, is an amendment of the law previously existing, which read as follows, (*Rev. Stat.*, *p.* 59, *sec.* 13): "The several boards of County Commissioners are authorized and required,—to provide for the erecting and repairing of court houses, jails, and other necessary buildings for the use of the county; but no tax shall be assessed, nor any debt created for the erection of Court Houses or Jails by said Board, without being first authorized so to do by a vote of the electors of the county." The amendment was adopted March 6, 1852, and is important, as removing a restriction which existed in the law as it was originally passed.

Boards of County Commissioners are public corporations, invested with subordinate legislative powers, to be exercised for local purposes connected with the public good. (*Comp. Stat.*, *p.* 153, *sec.* 6; *Kent's Com.*, *vol.* 2, *p.* 309.) As such, they are subject to the legal rules governing these bodies, and must derive all their powers from the law which creates them, or from some other positive statute. But it is to be understood that a corporation is not limited to the exercise of the powers specifically granted, but possesses in addition all such powers as are either necessarily incident to those specified, or essential to the purposes and objects of its corporate existence.

The statute above cited, authorizes and requires the County

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Commissioners to erect court houses and jails and other necessary buildings for the use of the county. The Defendants therefore in entering into the contract for the erection of a court house and jail for the use of Carver county, were engaged in the discharge of one of their legitimate duties, were exercising a power specifically conferred upon them by statute. The statute not only authorizes but absolutely requires them to provide for the erection of these buildings, and there can be no question, that in providing for these buildings they did not exceed the authority vested in them by law.

The only doubt it would seem, which can reasonably arise as to the action of the Commissioners in the premises, is in regard to the manner in which they have exercised their authority, to-wit: in creating a debt for the purpose of erecting these buildings. No specific authority is granted in the statute to a Board of Commissioners to issue bonds or any evidences of debt for this purpose. The objection is not to the form of the instrument, but is based upon the entire want of authority on the part of the Commissioners to bind the county by any written promise to pay *in futuro* for such improvements. I do not think the objection is tenable. The power of corporations in general to make contracts and incur debts in the prosecution of their legitimate business, and to give their promissory note for such indebtedness, would seem to be firmly established, not only by universal practice, but by repeated judicial decision. To attain its legitimate objects, it may deal precisely as an individual who seeks to accomplish the same end. It may contract for labor and materials, and make purchases, and borrow money for such objects, and give notes, bonds and mortgages towards payment. (2 *Kent's Com.*, 278, *note c; Mott vs. Hicks*, 1 *Cow.*, 513; *Moss vs. Oakley*, 2 *Hill.*, 265; *Kelly vs. The Mayor of Brooklyn*, 4 *Hill.*, 263; *Moss vs. McCullough*, 5 *Hill.*, 131; *Attorney General vs. Life and Fire Insurance Co.*, 9 *Paige*, 470; *McCullough vs. Moss*, 5 *Denio*, 567; *Ketcham vs. The City of Buffalo and Austin*, 14 *N. Y.*, 356; 15 *N. Y.*, 9; *Halstead vs. The Mayor &c. of New York*, 5 *Barb.*, 218; *Brady vs. The Mayor of Brooklyn*, 1 *Barb.*, 584; *Angell & Ames on Corp.*, *sec.* 111.

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The case of *Ketchum vs. The City of Buffalo*, 14 *N. Y.*, 356, is closely analagous to the one at bar, although the existence of the authority claimed by the corporation in that case, was more questionable than in this. Under a provision in the charter of the city of Buffalo, authorizing, (not requiring,) the common council to establish and regulate markets, it was held, that the common council was authorized to issue the bond of the city for the purchase of lots on which to establish a market, thus sanctioning the right of the corporation to purchase real estate, and that too on credit, for that purpose. As the only question here, is as to the right of the Commissioners to create a debt, or use the credit of the county for the purpose of erecting these buildings, the remarks of Selden, J., in giving the opinion of the Court in the case last above cited, are entirely pertinent to the point here in issue. "To deny," says he, "to such corporations the power to use their credit in any case, would scarcely comport with the object for which they are created. Under such a rule they could not procure materials for the repair of a bridge, unless the money had been raised in advance. The affairs of no municipal corporation were ever conducted, I presume, without incurring obligations for various purposes, in anticipation of its revenues. It may be said that there is a distinction between incurring debts for the ordinary and current expenses of the corporation, to be defrayed by the expected annual income, and debts upon an extended credit, for objects of a permanent character, as, for instance, that a debt may be created for the repair of a bridge or market, but not for the erection of, or procuring a suitable site for such market. I am unable to discover any solid basis for such a distinction, or any definite line by which it could be marked." The opinion throughout is a clear exposition of the law upon this subject, and the case was decided without a dissenting vote. The same principles are recognized in *Curtis et als. vs. Leavitt*, 15 *N. Y.*, 9; and in *Barry vs. Merchants' Exchange Company*, 1 *Sand. Ch. R.*, 280. Nothing opposed to these views was advanced in *School District vs. Thompson*, 5 *Min.*, 280, as that case (so far as the point here in question is concerned,) held that when a promissory note, made by Trustees of a School District, is

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set up as a cause of action, it must be shown affirmatively, by the party pleading it, to have been given for a debt which the Trustees were authorized to contract.

But the authority of a Board of County Commissioners to create a debt for the purpose of erecting a court house and jail, does not in this case depend alone upon general principles applicable to all municipal corporations clothed with like authority by express statute. The action of the Legislature upon the same subject, previous and subsequent to the enactment of the statute under which these bonds were issued, is important and expressive, and is in effect scarcely less than specific authority by the Legislature to create such debt. It will be observed that by the terms of the original act (as above quoted from the Revised Statutes,) it was provided that "no tax shall be assessed, nor any debt created for the erection of court houses or jails by said Board, without first being authorized so to do by a vote of the electors of the county." This restriction was removed by an amendment in 1852, and as the only purpose of the amendment was the removal of the restriction, no other construction can be reasonably placed upon the action of the Legislature than that it intended the Commissioners should have authority to create a debt for the purpose of erecting these buildings if necessary. This view is strengthened by the consideration of the provisions of "An Act to provide for County Organization and Government," approved February 28th, 1860. (*Sess. Laws* 1860, *p.* 130.) *Sec.* 22 of *Art.* II, of that act provides that "no tax shall be assessed, nor any debt created by said Board for the erection of court houses, jails or other county buildings, without being first authorized by a vote of the electors of the county;" thus restoring the law as it stood previous to the amendment of 1852, and amounting to at least an indirect expression of the Legislature, that without such amendment the Board of Commissioners had authority to create such debt. This view I think is placed beyond any reasonable doubt, by the last clause of the said section, which declares that "nothing herein contained shall be construed so as to prohibit the issuing of bonds by any county for the purpose of paying debts and liabilities already existing, or to take up bonds or orders already

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issued." This section was amended by *sec.* 2 *of chap.* VI, *p.* 47, *Sess. Laws*, 1861, some parts being omitted, but retaining the clause above quoted.

In view therefore of the well settled legal principles applicable to municipal corporations, and especially of the Legislative enactments in this State bearing upon this question, I think the Board of Commissioners of Carver county had undoubted authority to issue the bonds specified in the pleadings, and that, for aught that appears to the contrary, the same are valid and binding upon the county. As the Court has found that these bonds were received by the Plaintiff in full satisfaction of the agreement on the part of the Defendant, and that the Plaintiff has not yet completed the buildings, in accordance with his agreement, he fails to show a cause of action against the Defendant. And, indeed, it is admitted by the Counsel for the Plaintiff that if these bonds are legally binding upon the county of Carver, then the Plaintiff has no cause of action.

The reply alleges that the Defendant at all times since the execution of said bonds, has refused to pay, and still refuses to pay either interest or principal of the same, or any part thereof, and that long before the Plaintiff ceased to make the advances charged in the complaint, the said County Commissioners, by a formal vote when acting for said county of Carver, and by a formal resolution, repudiated said bonds, and decided that they would not pay them, either principal or interest. If the bonds had a legal and valid inception, and were binding upon the county when delivered to the Plaintiff, they could not of course, be invalidated by any such action on the part of the Commissioners. The Court below however, in its finding, is silent as to this allegation, (except as to the refusal to pay interest,) and it is therefore unnecessary to inquire how the Plaintiff may be affected by such action of the Defendant, if the allegation be found true, either as to his duty of negotiating the bonds, or his right to abandon the contract and sue upon the common counts. As the case is here presented, the judgment below must be affirmed.

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Albert Baze, Plaintiff in Error, *vs.* Francis Z. Arper, Defendant in Error.

ERROR TO THE DISTRICT COURT OF WASHINGTON COUNTY.

Previous to March 6th, 1852, Judges of Probate had no power to take the acknowledgment of conveyances of real estate. Subsequent to the last mentioned date they had such power. *R. S. p.* 211, *sec.* 8; *Comp. Stats.*, 495.

It is not necessary that official certificates of acknowledgment should be under seal unless the statute authorizing them expressly requires it. If the certificate styles the officer taking it as an officer authorized by statute to perform the act, it will be *prima facie* evidence of his official character. No seal is required by our act in 1852.

The act of 1856, published on *p.* 406 of the *Compiled Statutes*, does not comprehend acknowledgments of conveyances taken by Judges of Probate, but such only as were taken before the Clerks of the Supreme, District and Probate Courts.

A grantee of land who pays no new consideration, but takes the land in payment of a precedent debt, is not a *bona fide* holder for a valuable consideration, but takes the same subject to all claims and equities that could have been urged against his grantor.

The testimony had closed, and the Defendant was arguing the case to the jury. At this point the Defendant informed the Court that he had just discovered a material fact before unknown to him, and asked leave to prove it, which was refused. The Defendant, after concluding his remarks to the jury, presented an affidavit to the Court setting forth the newly discovered fact, and again asked leave to prove it, which was again refused. *Held*, that the Defendant was right in offering to prove the newly discovered fact immediately on ascertaining its existence; that had he waited until after verdict that fact alone would have been a sufficient answer to the application. *Held, further*, that to authorize a Court to open a case for newly discovered evidence, the evidence should be of that character that the party offering it could not, with due exercise of prudence, diligence and foresight, have discovered it before or at the trial, and that it should not be a mere explanation of the witness' evidence on the trial. Where a witness swears that the consideration of a deed was money paid at the time of the purchase, and after the trial states that it was for a precedent debt, an affidavit alleging the latter statement of the witness will be insufficient to open the case on the ground of newly discovered evidence. Something should appear to satisfy the Court that the fact exists, and can be proven; the mere statement of a witness who had sworn once the other way is too unreliable to be acted upon.

Section 7, *p.* 595 of the *Compiled Statutes* only cuts off the common law right that the defeated party in ejectment had to contest the right of possession as often as he saw fit, until arrested by a Court of Chancery. The statute limits this right to two trials, and declares the second judgment final, which means final so far as to bar another action for the same cause, but like all other final judgments it may be reviewed for errors committed on the trial.

The record of a conveyance acknowledged before an officer not authorized to take acknowledgments is no notice to subsequent purchasers, but the deed was good against an attaching creditor until the passage of the act of 1858. *Chap.* 52, *sec.* 1, *General Laws* 1858.

The Defendant in Error was the Plaintiff below, and brought an action of ejectment against the Defendant below, alleging that he was seized of lands from which the Defendant ejected him, and praying restitution.

The Defendant below pleaded two pleas. 1st. A denial. 2d. A special plea. That on the 7th October, 1850, one John R. Fish entered the land. That on November 12th of same

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year one Henry M. Rice commenced suit against Fish, and attached the land, proceeded to judgment, bought it at execution sale, received a Sheriff's deed, and in the year 1853, deeded to the Defendant below. That on the 9th November, 1850, Fish, in order to defraud his creditor Rice, deeded to Willoughby & Powers, who colluded with him, and Willoughby & Powers deeded to the Plaintiff below, who, the answer alleged, took with notice. Both deeds were also alleged to have been without consideration. The reply admits the answer except the allegations of fraud and want of consideration. As to them it alleges no fraud and due consideration, but does not state what it was.

The case was tried at the special term of the District Court Washington county, before Mr. Justice McMillan, and a jury.

The Plaintiff introduced—

1st. A certified copy of a duplicate certificate of entry of the land from the Land Office to John R. Fish, dated October 7th, 1850.

2d. A certified copy of the Register of Deeds, of a Quit Claim deed from Fish to Willoughby & Powers, dated November 9th, 1850, for the same premises. The copy purported to have been acknowledged before H. A. Lambert, Judge of Probate of Ramsey county, and the certificate of acknowledgment was without seal. The Defendant below objected to its admission on the ground that the instrument of record, of which it purported to be a copy, was not entitled to record, and therefore the copy was not evidence. That the Judge of Probate had no power to take acknowledgments, &c. The Court overruled the objection and Defendant excepted.

3d. A deed from Willoughby & Powers to the Plaintiff below, dated May 31st, 1852, and purporting to be acknowledged before the Judge of Probate, but the certificate without seal. This was objected to by the Defendant below on the ground that it was not proved that the Probate Judge was not authorized to take acknowledgments. The objection was overruled, and the Defendant below excepted.

The Plaintiff then proved that the Respondent had been on the land since 1853, and rested his case.

The Defendant moved for a non-suit on the ground that Plain-

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tiff had proved no seizin in himself; that no demand was shown before action brought, and consequently no wrongful entry; that the allegations of fraud in the answer were not denied.

The motion was denied and Defendant excepted.

The Defendant then proved the Sheriff's deed to Rice; the writ of attachment and Sheriff's return thereon, and recorded in the Register's office as alleged in the answer; and the deed from Rice and wife to Defendant below. The Defendant below then introduced evidence to show the fraud alleged in the answer.

On the cross-examination of Powers, he was asked the value of the land entered by Fish. On the objection of the Plaintiff below the question was excluded, and Defendant below excepted.

Powers on his cross-examination was also asked whether the Plaintiff, since receiving his deed, had conveyed the land to any person, which was objected to as immaterial, and excluded, and Defendant excepted. He was also asked whether the Plaintiff, since receiving his deed had not conveyed the land to Willoughby, or to any one for his benefit, or had he given him any contract with regard to it, or to any one for his benefit, to which the Plaintiff objected as immaterial and inadmissible under the pleadings; the objection was sustained, and the Defendant below excepted.

The witness Powers had testified that the Plaintiff below, Arper, had paid him for the land $250 in money. While counsel for the Defendant was summing up the case to the jury, and after he had been speaking some time, the other counsel for the Defendant stated to the Court that he had just discovered a fact as to the consideration of the deed from Willoughby & Powers to Arper; that the deed was given for a debt owing to Willoughby & Powers to Arper, and that Mr. Powers had himself so stated since the adjournment of the court. Counsel then stated that he thought Powers had not made himself properly understood when he said in his testimony that Arper gave $250.00 in money for deed to him, and that he thought Powers meant that it was what he regarded the same as money to him; and counsel asked leave to ask Mr. Powers, who was

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in court, how the fact was. The counsel for the Plaintiff below objected, and the Court refused the permission, and the Defendant excepted.

After the counsel for the Defendant had concluded his remarks, the same request was again presented to the court, and on the affidavits of Edmund Rice and the Defendant's counsel, and again refused, and Defendants excepted.

The Court charged the jury that if Arper had knowledge of sufficient circumstances attending the transaction between Fish and Willoughby & Powers, to arouse a reasonable suspicion in his mind of an intent on the part of Fish to defraud his creditors, it is sufficient to charge him with notice, but refused to charge on the request of Defendants below "That if Arper had knowledge of sufficient circumstances to put him on enquiry as to the claim of Rice, he was bound to pursue his enquiry, and cannot be considered a *bona fide* purchaser," to which refusal Defendant below excepted.

Points and Authorities of Plaintiff in Error.

I.—The Court below erred in admitting the copy of the record of the deed from Fish to Willoughby & Powers. Being acknowledged before a Judge of Probate it was not entitled to be recorded. *Comp. Stat.*, *p.* 398. It is not denied that the Probate Judge had no authority to take this acknowledgment, but the case is sought to be affected by the statute of 1856; *p.* 406, of the *Comp. Stat.* It is submitted that the statute only authorized the clerk of the Judge of Probate to take acknowledgments, and legalized them when taken before such clerk. *Laws of* 1853, *p.* 40. The law giving them clerks having been passed March 6th, 1852. And the statute creating Courts of Probate, and which was passed by the first Legislature, (case of *Francis Lee*, 1 *Minn.*, 70 and which may be found in the old *Revised Statutes*, *p.* 290,) gives the Judges thereof no power to take acknowledgments.

The Court equally erred in admitting the deed from Willoughby & Powers to Arper. It was not proved, unless by the certificate of acknowledgment of the Judge of Probate, which we have already seen he was incompetent to make.

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II.—The Court below erred in refusing to nonsuit the Plaintiff.

(*a.*) A Plaintiff in ejectment need not, it is true, trace his title back to government in any case, but he must trace it to some one in possession under at least claim of title. Without that he shows no title or seizin.

(*b.*) In the case at bar there was no pretence that any of the prior grantors of the Plaintiff were ever in possession of the land.

His only title is a land office certificate. Such a certificate conveys no estate in the land. It is a mere contract on the part of Government that on the surrender of the certificate, it will grant the land. It is a mere contract of sale, giving an equitable and not a legal title, and does not entitle the holder to possession. If he takes possession, it must be deemed to be by virtue of a license from the owner, and not from any right given by such a contract. *Hill. on Vendors, p.* 3; *6th Barb.*, 116, *Kellogg vs. Kellogg.* That ejectment will not lie on a land office certificate, see 23 *How.*, 235, *Hooper vs. Scheimer*; *Fenn vs. Holmes*, 21 *How.*, 482.

Under the old system, a Defendant in possession under such a title might defend it against an action of ejectment, by filing a bill to stay the action at law, setting up his equitable title. And under the code he could avail himself of the same defence by way of answer; but he cannot bring his action of ejectment under either system till he has obtained the legal title.

III.—The Court below erred in excluding the question to the witness Powers as to the value of the land Fish entered. It bore upon the question of his good faith in the transaction.

IV.—The Court below erred in excluding the question to the witness Powers as to whether the Plaintiff below, Arper, had, since acquiring the land, re-conveyed to him, Powers, by deed or contract, or to any one for his benefit.

(*a.*) The question was clearly proper, to show the interest of the witness in the case. We were not bound to take his simple judgment or answer as to whether he was interested or not.

(*b.*) One of the main questions in the case was, whether

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Arper was such a purchaser for value and without notice, as to enable him to recover, even though fraud was proved as between Willoughby & Powers and Fish. Had it then appeared by answer to this question that Arper had re-conveyed to Powers, and that Powers was now the only party in interest, or Powers & Willoughby, the question as to the good faith of Arper would have been eliminated from the trial, and the only question would have been as to the good faith or fraud of the transaction between Fish and his vendees.

V.—The Court erred in refusing to allow the Defendant below, on his application, after the evidence was closed, to show that the deed to Arper was in consideration of a precedent debt.

(*a.*) The evidence was of the highest importance; for if the consideration of the deed were a precedent debt, Arper would have stood in no better position than his grantors. *Dickson vs. Tillinghast*, 4 *Paige*, 215; *Rosa vs. Brotherton*, 10 *Wend.*, 86; *N. Y. Bank vs. Worthington*, 12 *Wend.*, 593; *Payne vs. Cutler*, 13 *Wend.*, 605; *Clark vs. Ely*, 2 *Sandf's Ch.*, 168; 6 *Hill.*, 93; 1 *Barb.*, 225; 2 *Barb.*, 559; 4 *Barb.*, 304; 6 *Barb.*, 445.

(*b.*) It appeared that the evidence was just then discovered, and the witness in Court, and also the main witness of the Plaintiff. Had the evidence been discovered after verdict, and a motion made for a new trial on affidavit, the Court would have been bound to grant the motion; and if the Court below did not, this Court would. Every requisite for such a motion would have been complied with. The evidence would have been material—newly discovered and not cumulative. and the statement was made in open Court, in the presence of the witness who was to prove it.

(*c.*) Being discovered before verdict, it was the duty of the Defendant below to offer it when he did; otherwise it would not be ground for a new trial. The rule is thus laid down:

"If new evidence is discovered before the verdict is rendered, it should be submitted to the jury; and if that is neglected, a new trial will not be granted for that cause." 1 *Gra. & Wat. on New Trials, p.* 481, citing *Higden vs. Higden*, 2 *Marsh Ky. R.*, 42.

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Again: "A new trial will not be granted where the defect became known to the party at the trial," &c. *Wiggin vs. Coffin*, 3 *Story's Rep.*, 1.

And though a *nisi prius* Judge has undoubtedly a discretion as to the admission of testimony offered at such a stage of the case; yet it is a legal discretion, and liable to review, the same as his action upon a motion for a new trial. *Mercer vs. Sayre*, 7 *Johns*, 306, was a case like this, and a new trial was granted.

A motion for a new trial could not have been made on this ground, for the reason that the Defendant below could not have made it appear that he had discovered the evidence since the trial.

This writ of error, then, is the only way in which the Plaintiff in Error can obtain redress.

VI.—The Judge erred in refusing to charge as requested by Defendant below, "That if Arper had notice of the claim of Rice, he could not be a *bona fide* purchaser." He did charge that if he had notice of a fraudulent transaction on the part of Fish, he would not be a *bona fide* purchaser.

The true rule is, that if Fish knew Rice claimed the transaction to be fraudulent, he must then interfere at his peril. Powers says that Arper knew of the attachment and consulted a lawyer about it, but the Court below held that not sufficient, but that he must have notice of Fish's fraudulent intent.

We submit that no such fraudulent intent could ever possibly be shown. All that in any case could ever be shown, would be that a purchaser knew that it was claimed the transaction was fraudulent.

The judgment should be reversed and a new trial awarded.

Points and Authorities of Defendant in Error.

I.—The Courts of Probate of the late Territory of Minnesota were Courts of Record, and the Judges of said courts were fully authorized and empowered to take acknowledgments of deeds; but even had there been any doubt as to their power, acknowledgments taken before Judges of Probate and admitted to record pursuant thereto, were fully cured by the reme-

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dial act of February 6, 1856. *Stat. of Minn.*, 398, *sec.* 8; *p.* 495, *Stats.*; *Stat. of Minn.*, 406, *secs.* 1, 2; In case of *Francis Lee*, 1 *Minn. R.*, 70; *Armstrong vs. Perry*, 5 *Wend.*, 536; *Bank of Charleston vs. Emeric*, 2 *Sandf.*, 718.

II.—The Register and Receiver's certificate of entry does not purport to be, nor is it a mere contract of sale, but is evidence of title to the lands described in it, whether in the hands of the original party or his alienee. *Stats. of Minn.*, 686, *sec.* 88; *Camp vs. Smith*, 2 *Minn.*, 155; 4 *U. S. Dig.*, 609, *sec.* 114; 4 *Miss.*, 458; 2 *U. S. Dig.*, 120, *sec.* 32; 7 *S. & R.*, 230; 1 *Wheaton's Selwyn*, 696, *and notes* and cases there cited; 2 *Greenl. Ev.*, *secs.* 304 *to* 307 and cases cited.

III.—It was not error in the Court to exclude the following question addressed to the witness Powers: "What was that land worth?" as it was not a proper cross-examination, but an attempt on the part of Defendant's Counsel to reopen their case and supply what they conceived to be omissions in their affirmative defence, and because the question was too indefinite as to time.

IV.—It was not error in the court to exclude the following questions addressed to the witness Powers on his cross-examination, viz: "Has Plaintiff since receiving his deed conveyed this land to any other person?" "Has Plaintiff since receiving this deed conveyed this land to Willoughby or to you or any one for your benefit, or has he given you any contract with regard to it or to any one for your benefit?"

V.—It was not error in the court to refuse leave to Defendant's counsel to recall a witness after the case had closed and Defendant's counsel had been for some time engaged in addressing the jury; nor is there anything before this Court of which it will take notice in respect to the alleged error in the court below; and if there was, the affidavit of the witness sought to be recalled is clear and unequivocal to the point, that he made no such statement as the one referred to in the counsel's request to the court below, and not only reiterates his former testimony but supports it by other affidavits. *The People vs. The Sup. Ct. of N. Y.*, 10 *Wend.*, 293; *Brisbane vs. Adams*, 1 *Sandf.*, 198.

VI.—It was not error in the court to decline to charge the

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jury, "That if Arper had knowledge of sufficient circumstances to put him on the inquiry as to the claim of Rice, he was bound to pursue his inquiries and could not be considered a *bona fide* purchaser," because not only was it too indefinite as to time, and an assumption of the fact that Fish committed a fraud, but would have been gross and inexcusable error so to charge.

VII.—That as to the Plaintiff in Error's specifications of error in his sixth point in respect to the charge, "That the Plaintiff must have notice of the fraudulent intent of Fish," there is no ground of error, as not only was the charge made at the request of Defendant's counsel, but there was no exception to such charge.

VIII.—That this being an action of ejectment and there having been two successive verdicts for the Plaintiff in the court below, the last verdict is final and conclusive between the parties and this writ of error will not lie.

ALLIS & PECKHAM, Counsel for Plaintiff in Error.

D. COOPER, Counsel for Defendant in Error.

By the Court—FLANDRAU, J.—When the Territory of Minnesota was organized, the laws of the Territory of Wisconsin, which were in force at the date of the admission of the State of Wisconsin, were extended over it by the *Organic Act*, *sec.* 12. By these laws the only officers authorized to take the acknowledgment of deeds were Judges and Commissioners of the Supreme Court, Notaries Public and Justices of the Peace. (*Laws of Wisconsin* in force at the organization of Minnesota Territory, published with the laws of the first session of the Legislature of Minnesota Territory of 1849, by James Goodhue, *p.* 134, *sec.* 10.) By *section* 1 *of chapter* 3, *of chapter* 20 *of the laws of* 1849, which took effect on the first day of December, 1849, Courts of Probate were erected and made Courts of Record, but the power to take acknowledgments was not conferred upon them or the Judges thereof. This continued to be the law until September 1st, 1851, when the Revised Statutes went into effect. *R. S.*, *p.* 578, *sec.* 1.

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By the Revised Statutes other officers were authorized to take acknowledgments, among whom were designated "any Judge of a Court of Record." *Id.*, *p.* 211, *sec.* 8. But the Revised Statutes at the same moment they conferred their authority upon "Judges of a Court of Record," repealed the previous act of 1849, which made Probate Courts Courts of Record, and created new Probate Courts, which were not Courts of Record. *R. S.*, *p.* 578, *sec.* 1; *Id.*, *p.* 71. Neither Probate Courts or Probate Judges therefore had the power to take acknowledgments up to the first of September, 1851. The deed from Fish to Willoughby & Powers of date of November 9, 1850, which was acknowledged before the Judge of Probate of Ramsey county, on the day of its date, was not entitled to be recorded, nor could it be read in evidence under such acknowledgment.

On the sixth day of March, 1852, the Legislature passed an act which declared the existing Courts of Probate to be Courts of Record, and gave them a seal and a clerk. *Laws and Reports of* 1853, *p.* 40; *Comp. Stats.*, 495. From this time the Judges of Probate were empowered to take acknowledgments, by virtue of *sec.* 8, *p.* 211, *R. S.*; *p.* 398, *Comp. Stats.* Therefore the deed from Willoughby & Powers to the Plaintiff of date of May 31, 1852, was properly received in evidence under the acknowledgment of the Probate Judge, so far as his competency to act was concerned. The objection went also to the absence of a seal to his certificate.

It is not necessary that these official certificates of acknowledgment should be under seal unless the statute authorizing them expressly requires it. 2 *Cow. & Hill's Notes to Phil. Ev.*, *p.* 462. If the certificate styles the officer taking it as an officer authorized by statute to perform the act, it will be *prima facie* evidence of his official character. *Id.*, 461–2–3. No seal was required by our act.

But it is contended by the Plaintiff that the defect in the acknowledgment of the deed from Fish to Willoughby & Powers is cured by the statute of 1856; *p.* 406 of the *Comp. Stat.* The language of this act is as follows: "The acknowledgment, &c., * * * heretofore made and taken before any clerk of either the Supreme or District Courts and Judges of

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Probate of this Territory, and the certificate of any such acknowledgment made by any such clerk," shall, &c. The language is a little obscure; but the latter part of it refers to the clerks exclusively and does not include the Judge of Probate. In order to determine what was meant, whether the Judge of Probate, or the clerk of the Judge of Probate, we can take into consideration that the Judge had possessed the right previously, and since the sixth of March, 1852, and the clerk had never enjoyed it. It would seem more probable therefore that the curative law was aimed at the acts of officers who had never been authorized, than those who had been entitled to act for several years past. But what relieves the statute from its apparent uncertainty of expression and makes it clear that the clerks and not the Judges were intended, is the second section, which employs the exact language used in the first in another sense. It is as follows:

"The several clerks of the District Courts and Judges of Probate of this Territory are hereby authorized to take acknowledgments of all deeds," &c. The words as here used, "Clerks of the District Courts and Judges of Probate," must certainly refer to the clerks of the Judges, and not the Judges themselves, because we cannot suppose the Legislature intended to confer a power upon the Judges which they then possessed, and had enjoyed and exercised since 1852, which would be senseless, while we may well conclude that they did intend to bestow it upon the clerks who had not previously been invested with it. The Legislature had undoubtedly discovered that the clerks of these courts had been exercising this power in an unauthorized manner, and designed to save their acts already done, and prevent further mischief by empowering them to act in future.

The counsel for the Respondent says there is no such officer as the clerk of a Judge of Probate. That the office created is clerk of the Probate Court, and not of the Probate Judge. This is technically correct, but the expressions, Probate Court and Judge of Probate, are frequently used as convertible terms by laymen, and the framers of such a statute should not be accused of knowing the difference. It means what we

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have said, or it has nothing to operate upon; we must therefore adopt that construction in preference to a total rejection of that part of it. The deed therefore is not aided by the act.

The nonsuit with the evidence then in the case was properly denied. The certificate of entry by Fish, under whom the Plaintiff's grantor held, is declared by our statute to be *prima facie* evidence that the title to the lands is in the person named therein or his heirs or assigns. *Comp. Stats.*, 686, *sec.* 88; *Camp vs. Smith*, 2 *Minn. R.*, 155.

It does not appear from the case at what point in the testimony of the witness Powers the cross-examination began, but as he was called by the Plaintiff, and the question as to the value of the land at the time of the purchase from Fish was put by the Defendant, we are to suppose that it occurred on cross-examination. The witness had testified in the early part of his examination all about the consideration of the sale from Fish to Willoughby & Powers; the question of fraud in that transaction being directly in issue, the value of the land was clearly material, and also apposite as a cross-examination. We think the Court erred in excluding it.

The next ruling of the Judge it is unnecessary to consider; we do not think however that he erred in excluding the evidence.

It was a material point for the defence to prove that the deed from Willoughby & Powers to the Plaintiff was in consideration of a pre-existing debt, and not for a new and valuable consideration advanced by the grantee at the time of the purchase. The theory of the defence was that the transaction between Fish and Willoughby & Powers was fraudulent. After establishing that step in the defence, the Defendant was still bound to bring home notice of the fraud to the Plaintiff when he purchased, in order to succeed, if the Plaintiff had paid out money or other valuable thing in consideration of his deed. But on the contrary, had the Plaintiff merely relinquished a precedent debt for the land, he would not occupy the position of a *bona fide* purchaser, and the Defendant would be relieved from the necessity of convicting him of notice of the fraud. A grantee of lands who pays no new consideration, takes subject to all claims and equities that

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could have been urged against his grantor. *Dickinson vs. Tillinghast et al.*, 4 *Paige*, 215. The same rule applies to the purchase of negotiable commercial paper. 10 *Wend.*, 86; 12 *Id.*, 593; 13 *Id.*, 605; 6 *Hill.*, 93; 1 *Barb.*, 225; 2 *Id.*, 559; 4 *Id.*, 304; 6 *Id.*, 445. After the testimony had closed and the Defendant had partially argued the case to the jury, the Court was informed by the Defendant that he had just discovered a fact as to the deed from Willoughby & Powers to Arper. That the deed was given for a debt owing by Willoughby & Powers to Arper; that Mr. Powers had himself so stated since the adjournment of the Court, and also stated that he thought Powers had not made himself properly understood when he said in his testimony that Arper gave $250 in money for the deed to him, and that he thought Powers meant that it was what he regarded the same as money to him, and asked leave to ask Mr. Powers who was then in Court how the fact was. This request the Court refused under the objection of the Plaintiff. The Defendant then concluded his remarks to the jury, and again renewed the request on the affidavit of Mr. Edmund Rice, which contained the facts previously stated by the Defendant, and the Court again refused to hear the evidence.

The Defendant was undoubtedly right in making the offer immediately on discovering the evidence. Had he waited until after the verdict was rendered, his delay would have been a sufficient answer to the application. 1 *Gra. & Wat. on New Trials, p.* 481. The Court had undoubted power to receive the testimony. *Mercer vs. Sayers*, 7 *John.*, 306. There is however one feature in the nature of the testimony offered in the case at bar, which constitutes a good answer to its being admissible as newly discovered evidence. The evidence must not only be material, and discovered since the trial, but must also be of a character that the party offering it could not with a due exercise of prudence, diligence and foresight, have discovered it before or at the trial. *Williams vs. Baldwin*, 18 *John.*, 489 Now this witness, it seems from the statements in the case, had testified on the trial that the consideration moving between Arper and himself for the land, was $250 in money paid at the time of the purchase. The

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Defendant's counsel had an opportunity of cross-examining him upon the subject of the consideration and sifting out the truth, and he should have known that it was very important to show that it was a debt and not money. It was negligence not to press the witness closely upon this point and elicit every fact connected with the matter.

Again: The offer was to allow the witness Powers to explain his testimony given on the trial. In *Slimbach vs. Cal. Ins. Co.*, 2 *Caine's Rep.*, 132, where an explanation was offered as newly discovered evidence, the Court says: "This explanation comes too late. A witness under examination may explain and correct himself, but it will be dangerous and improper to receive any elucidation from him after the trial, and especially after the lapse of many months." In this case nine months had elapsed, which changes it materially from the case at bar. But the refusal to allow an explanation on a point which a proper cross-examination could have cleared up on the trial is not ground for a new trial.

The affidavit was materially defective; it merely alleged that the witness had stated that the consideration was a precedent debt. Even had the witness told the affiant that such was the fact, it would have been insufficient. Something should appear to satisfy the Court that the fact exists and can be proven; the mere statement of a witness who had sworn once the other way is too unreliable to be acted upon. *Shumway vs. Fowler*, 4 *John.*, 425. If it was intended to impeach the witness by proving contradictory statements made by him, it was equally inadmissible. 1 *Cain's Rep.*, 24; 4 *John.*, 425. For these reasons we do not think that the Court erred in refusing to allow the witness to be recalled.

The counsel for the Respondent insists that the verdict in his favor on the second trial is final to the extent that a writ of error will not lie to the judgment entered upon it. *Sec. 7, p. 595, Comp. Stats.*, which declares that such a judgment "shall be the final determination of the rights of the parties," only cuts off the common law right that the defeated party in ejectment had to contest the right of possession as often as

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he saw fit until arrested by a decree of the Court of Chancery. *Bates vs. Stearns*, 23 *Wend.*, 481. The statute limits this right to two trials, and declares the second judgment final—that is, final so far as to bar another action for the same cause; but like all other final judgments it may be reviewed for errors committed on the trial.

The statement in the paper books furnished the Court concerning the issue made by the pleadings, on the subject of notice in Baze of the prior deed of Fish to Willoughby & Powers, at the time he purchased from Rice, is as follows:

"The answer further alleges that the deed to Willoughby & Powers from Fish was never acknowledged so as to entitle it to be recorded, and that the Defendant never had any notice of it, and demands that the deed be cancelled and declared void, &c."

"The reply admits the allegations of the answer except as to fraud and want of consideration, as to them it denies them in general terms," &c.

The unauthorized record was no notice to Baze. *Shaubhut vs. Parret, decided at the July term*, 1861. And it is admitted by the pleadings he had no actual notice of the deed, yet he can take from his grantor Rice no more than he had under his attachment, judgment, and subsequent purchase at Sheriff's sale. The deed from Fish to Willoughby & Powers was executed and delivered before the attachment of Rice against Fish was levied on the land, and although not recorded legally was good against the attachment. *Greenleaf vs. Edes*, 2 *Minn. R.*, 264. If Rice took nothing under his attachment and sale, Baze took no more from Rice. Therefore the whole question returns to the fraud in the Sale from Fish to Willoughby & Powers, and that must be made out to render the land subject to the attachment of Rice, and through him, to pass the title to Baze. The Defendant therefore cannot have judgment in his favor upon the admission in the pleadings that he took without notice of the Fish deed, because it was good against his grantor without record or notice, in the absence of fraud, and is equally so against him.

There must be a new trial for the error committed in receiving the transcript of the record of the deed from Fish to

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Willoughby & Powers in evidence, against the objection of the Defendant, and in overruling the question to the witness Powers, touching the value of the land when sold to Fish.

New trial awarded.

AMBROSE KENNEDY, Plaintiff in Error, *vs.* GEORGE H. RAUGHT, Defendant in Error.

ERROR TO THE DISTRICT COURT OF NICOLLET COUNTY.

Section 88 *of Chapter* 63 *of the Compiled Statutes, on pages* 592-3, is penal in its nature. Where a Justice of the Peace is sued under that section for not setting up a fee bill in his office, and acquitted, no appeal lies against him.

The section is limited in its operation to officers in, and to come into office, within six months after its passage.

Where a jury retire in the evening and the Court adjourns before they agree, the Judge cannot meet the jury in the absence of the parties and receive their verdict out of Court, discharge the jury and render the verdict himself on the opening of the Court, the following day. Such a proceeding is irregular.

Points and Authorities of Plaintiff in Error.

The errors apparent on this record, even though they may not be such as have been passed upon by the inferior jurisdiction, are, we hold, nevertheless cognizable by this Court. This Court will inspect the whole record and cause "to be done in the premises what of right and according to the laws of the land ought to be done." 11 *Wheat.*, 172; *Dred Scott vs. Sandford, December term Sup. Ct.* 1856; *Speak vs. Shepard*, 6 *Harr. & John.'s R.*, 81, citing *Am. Com. Law*, 5, 81; *Anderson vs. the State*, 5 *Harr. & John.'s R.*, 171; *Claflin et al. vs. Lawler et al.*, 1 *Minn. R.*, 297. With this understanding of the province and power of this Court we respectfully suggest,—

1. That the District Court had no jurisdiction in this case

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and that the entire proceedings in the premises are void, and herein:

I.—The Defendant below had been tried before a justice of the Peace under a penal statute, and acquitted. This case, whatever may be the language of the statute as to the remedy, is in the nature of a *qui tam* action. In Minnesota, under the statute, the act complained of is against a public officer for neglect of duty. This neglect subjects him to a penalty, to a forfeiture. It is called in law a misdemeanor, an offence. This then is not a case on contract; nor has it any features of such a case. It is a case of a penalty by statute. The amount of the penalty is fixed and limited and cannot be to exceed two dollars for each day the law is violated by the public officer. It does not change the character of the offence that the penalty may be recovered by a civil action before a Justice of the Peace. *Constitution of the State of Minnesota, Art.* 1, *sec.* 7.

II.—But again, there is no appeal in criminal offences except by the Defendant charged with the offence. In this class of cases, whether the penalty goes to the State or to an individual by statute, the rule is the same. *Chap.* 81, *Rev. Stat., p.* 413, *sec.* 1, has been construed by this Court, in the *State vs. McGrorty*, 2 *Minn. R., p.* 226–7, and supported by authorities therein cited, to extend only to Defendants as offenders, and not to the prosecution in cases of an offence, whether the State, or an individual to whom the authoity is given by statute, be the prosecutor. *U. S. vs. Moore*, 3 *Cranch*, 159.

III.—But if the Court had jurisdiction of the offence, and could try the offender a second time on an appeal from a final judgment of acquittal, the Defendant was certainly entitled to the benefit of the rule that penal statutes where they act upon the offender must be construed strictly. The Court erred in this respect. There is no proper case made by the pleadings presenting an issue on which judgment or verdict contemplated by the statute could be based. In all criminal or penal actions the verdict is guilty or not guilty. The Defendant is charged by the 34*th sec.*, *chap.* 73 *of the statutes*, with an offence. The pleadings should have been so framed under the statute that the verdict might have been guilty or

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not guilty; and in case of guilty, to have enabled them to have assessed the amount of the penalty according to the proofs in the premises. In the case of *Cole vs. Smith*, 4 *John.*, 393, 397, the rule is laid down in a *qui tam* action similar, to this effect, that in actions founded upon a statute, the pleading must state especially the cause of action arising under the statute. In this case the complaint does not follow the language of the statute. 17 *John.*, 438, 445.

IV.—There was no verdict rendered in this case such as the law recognizes. 3 *Bla. Com.*, 377; 3 *Gra. & Wat. on N. T.*, 1409; *State of Ohio vs. Eagles*, 13 *Ohio R.*, 394; 4 *Coms.*, 547, (cited in *Voorh. N. Y. C.*, 5*th Ed.*, *p.* 323; 1 *Monell's Prac.*, 2*d Ed.*, 690; 7 *John.*, 32; *Gra. & Wat. on New Trials*, 1408; *Sec.* 33, *chap.* 61, *Comp. Stat. of Minn.*, 561.

Points and Authorities of Defendant in Error.

I.—"Actions for fines and forfeitures, whether presented by public officers or private persons, are governed by the same rules as other civil actions."

The statute prescribing the forfeiture for want of publication of fee bill makes it recoverable by civil action, and in no other way. *Comp. Stats.*, 615, *sec.* 8; *Id.*, 592, *sec.* 34, (33).

II.—No doubt can be entertained of the sufficiency of the complaint to show a cause of action. Not even a reference to the statute upon which the complaint was grounded was necessary. *Van Sant. Pleadings*, 270; 8 *How.*, 431.

The complaint covers all the time the Plaintiff in Error was in office and is sufficiently definite; but were it otherwise, this is not the place to attempt to take advantage of such a defect. That question should have been settled on the trial. *Comp Stat.*, 502, *sec.* 34. If an irregularity is waived it is too late now to make an objection. 1 *Minn.*, 228.

III.—"Where a statute imposes a penalty or forfeiture for an act injurious to the rights of another, and the penalty is given to the party aggrieved, it is in the nature of a satisfaction for the wrong done." 2 *Comstock*, 182.

The Plaintiff is the party receiving the amount recovered, and is by statute made the party aggrieved.

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IV.—No such error or irregularity was committed in receiving the verdict of the jury as will vitiate it.

"The Court is to be deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury is discharged." *Comp. Stat.*, 560, *sec.* 29.

The jury agreed upon their verdict, were conducted into Court, delivered their verdict, and being asked whether they had agreed upon their verdict, declared the same in accordance with *sec.* 31, *p.* 560. That parties or attorneys are not present, is not the fault of the Court. It is not the duty nor would it be becoming in the Court to start out in pursuit of them, or to wait for them to be brought in; they neglect their post at their peril.

Even had there been a technical irregularity under *section* 33, that section can only be regarded as directory, and no such wrong or injustice was committed as to induce a higher Court to reverse the judgment of a jury and the proceedings of the Court below. *2d vol. Gra. & Wat. on New Trials*, 49.

V.—The statute is intended to operate as a protection against exorbitant and illegal charging, and for that purpose operates as a law until it is repealed by subsequent legislation. It has not been repealed.

"A penal statute is not to be construed so strictly as to defeat the obvious intention of the Legislature in passing it." 1 *Selden*, 562.

Thomas Cowan, and Cox & Bryant, Counsel for Plaintiff in Error.

Paulding & Austin, Counsel for Defendant in Error.

By the Court—Flandrau, J.—The Defendant below was sued under *sec.* 33, *p.* 592 *of the Compiled Statutes*, for not publishing and setting up in his office a table of his fees as Justice of the Peace. The suit was commenced in 1858, and the complaint charged that the Defendant was a Justice for two years immediately preceding the 11th day of May, 1858. The Defendant was acquitted before the Justice, from which an appeal was taken to the District Court, where he was con-

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victed, and a verdict rendered against him of $39.00. At the trial in the District Court the jury was sent out for deliberation in the evening of Wednesday, and the Court at once adjourned until Friday morning then next. No stipulations were made concerning the manner of receiving the verdict when the jury should agree. At half past eleven o'clock on Wednesday night, the jury being agreed, came into the Court Room, where the Judge received their verdict in the absence of both parties, and discharged them. On Friday morning the Judge announced the verdict without the jury being called, or being present to be polled, or verify the verdict. Exceptions were taken to these several errors and were overruled by the Court.

The statute under which this prosecution is taken is clearly a penal law. It imposes a duty, and declares a forfeiture of money not to exceed two dollars for each day the duty is neglected. The penalty is recoverable in a civil action by any informer in his own name, but that does not change its penal nature. We think, therefore, that the Defendant having been fairly acquitted of the offence, no appeal could be taken against him. *Const. Minn., art.* 1, *sec.* 7.

We think the statute is limited in its operation to officers in office, and to come into office, within six months after its passage. The language is that the fee bill must be set up in his office "within six months after the passage thereof," referring to the chapter which was passed in 1851. The reason may have been that after that time the statutes would be sufficient notice in themselves. It may be the result of inartificial expression. It is however clear, and can admit of no construction that would extend it to the present case.

The Judge erred in receiving and delivering the verdict in the manner he did. It is very customary when juries are sent out in the evening, to consent that they may seal up their verdict and disperse if they do not agree before the adjournment of the Court. In such cases they deliver it to their foreman, the Judge, clerk or such person as may be agreed upon; but the jury is not discharged, it is only permitted to separate, and in all cases assembles to render the verdict. Parties perhaps in a strictly civil case might consent to let them be

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discharged on their agreement and receive the verdict in their absence, but consent would be always necessary. Jurors have been frequently known to agree to a verdict merely for the purpose of being liberated, and dissenting when the verdict is about to be rendered. Parties are always entitled to have the jury present when the verdict is rendered.

The judgment must be reversed.

THOMAS E. BENNETT *et als.*, Appellants, *vs.* GEORGE HEALEY, Respondent.

APPEAL FROM THE DISTRICT COURT OF WINONA COUNTY.

A mortgagee sold a piece of land under a foreclosure by advertisement by virtue of a power of sale contained in the mortgage, authorizing him to sell and pay himself whatever was due on the mortgage. In the notice of sale he claimed about twice as great a sum to be due as was actually due upon any calculation that could be made upon the terms of the note or mortgage. He became himself the purchaser, bidding the full amount alleged to be due. He refused a subsequent mortgagee the privilege of redeeming by paying what was in fact due, but insisted upon the whole sum bid being paid, and interest. The second mortgagee paid the whole amount under protest and brought suit to recover back the excess. *Held*, the action would lie. *Held also*, that a foreclosure under the statute by advertisement, which is regular within the terms of the power, is binding upon subsequent incumbrancers, notwithstanding they have no notice except such as is conveyed to them through that published in the newspaper.

The cases of *Bidwell vs. Whitney*, 4 *M. R.*, 76, and *Banker vs. Brent*, *Id.*, 526 commented upon and explained.

This is an action for money had and received. The complaint charges, that on the 3d day of October, 1856, the Defendants were partners in business under the firm name of Taylor, Bennett & Co.; that on said day one Chas. Moore was the owner in fee simple of 160 acres of land in the county of Winona. That on said day said Moore executed and delivered to Defendant, Thomas E. Bennett, as a member of said firm, a mortgage upon said premises to secure the payment of two promissory notes of even date therewith,—one for $345 and

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due in six months, and the other for $390, due in one year; that the mortgage was recorded in the proper office on the 11th of October, 1856; that said Moore and wife by deed of conveyance, dated March 19th, 1857, and duly recorded on the 22d of March, 1857, conveyed the said premises to one C. C. Cook; that on the 8th day of July, 1857, said Cook executed a mortgage to the Plaintiff upon said premises, to secure the payment of $650 in one year, with interest at the rate of 3 per cent. per month, payable quarterly, which mortgage was duly recorded on said last named day; that the same is still the property of the Plaintiff, in full force and unpaid; that prior to said 8th of July said Moore had paid the first note herein first mentioned to the Defendants; that prior to the 1st of January, 1859, the following payments had been made to the Defendants upon the said second note, to-wit: by said Moore in the summer of 1857, $100, and shortly after, $50, and on or about the 14th of December, 1858, by said Cook, $77.95; that in the month of June, 1859, the Defendant Bennett, by virtue of a power of sale contained in said mortgage executed by said Moore to him, and pursuant to the statute in such case made and provided, caused to be published a notice, a copy of which is attached and made part of the complaint; that the mortgage described in said notice is and was the one executed by said Moore to said Bennett; that in pursuance of said notice he caused said premises to be sold by the Sheriff of said county on the 18th of July, 1859; that upon said day and at the time and place specified in said notice, said premises were duly sold by said Sheriff to said Bennett for $410; that that sum was claimed in said notice and by said Bennett to be due upon said note and mortgage, and costs of sale; that there was no greater sum at that time due than $200, and that $410 was not then due thereon as claimed by said Bennett; that the Plaintiff desiring to redeem the said premises as provided by statute, from said Bennett, and being ready and willing to pay said Bennett the amount that might be due him upon said mortgage, and interest and costs of sale, on the 17th of July, 1860, informed said Bennett that he was then ready and willing so to do, and re-

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quested said Bennett to inform him of the dates and amounts of the payments made thereon or to exhibit to him said note executed by said Moore; that said Bennett refused so to do and refused to receive for the redemption of said premises any less sum than $410 with interest at 12 per cent from and after the 18th of July, 1859, amounting in all to $459.20; that the plaintiff was and still is unable to ascertain the exact amount due to said Bennett on said note and mortgage, for the reason that said Moore (who is the only one aside from said Bennett having knowledge thereof,) has departed this State and now resides in the State of New York; that after such refusal the Plaintiff did on said 17th of July, 1860, pay over to Lynch R. King, Sheriff of said Winona county, as provided by statute, $459.20, for the purpose of redeeming said premises from said Bennett; that upon the payment of said money by Plaintiff to said Sheriff, he protested against the payment thereof and informed said Sheriff that the same was paid under protest, and that no greater sum than $260 was actually due for the purpose of redeeming said premises, of which said Bennett was informed at time of payment of the money to him by said Sheriff; that at the time of the purchase of said premises at said mortgage sale by said Bennett no money was paid therefor by him or by either of the Defendants to the Sheriff, or any one else, nor has there been any paid since; that there is not now and was not on said 17th of July due upon said note and mortgage any greater sum than $260, inclusive of principal, interest, and costs of sale; that although that sum was tendered to said Bennett he refused to accept the same; that all the acts of said Bennett were the acts of the other Defendants also and were done as one of the firm of Taylor, Bennett & Co.; that the sum of $199.20 was over paid to said Bennett, and by him wrongfully received; that on the 17th of July, 1860, said Cook, for a valuable consideration, assigned to Plaintiff his right, title and interest in and to all surplus moneys that might remain out of the proceeds of said mortgage sale of said premises, after paying the amount due to Defendants; that he has demanded payment of the Defendants of the sum of $199.20, so wrongfully and unlawfully received and claimed by said Defend-

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ants, yet they have refused to pay the same or any part thereof.

The Defendants demurred to the complaint, on the ground,

1st. There is a defect of parties as to the Defendants.

2d. That the complaint does not state facts sufficient to constitute a cause of action.

The Court overruled the demurrer.

Points and Authorities for Appellants.

I.—The complaint in this case shows that the premises were duly advertised by the Defendants and sold by the Sheriff of the proper county; that they were bid off by the Defendant upon the sale for no greater sum than they claimed to be due to them in the notice of sale and upon the sale; that Moore, the mortgagor, Cook, the purchaser of his equity of redemption, and this Plaintiff, the mortgagee of Cook's equity, had each due notice of the sale and the sum claimed by the Defendants to be due to them upon the mortgage, and that neither of these parties took any steps to have the amount due upon the mortgage assessed, or raised any objection to the amount claimed by Defendants, prior to or upon the sale, and no excuse of any kind is claimed to exist accounting for the neglect. The complaint therefore shows upon its face that no cause of action exists in favor of the Plaintiff against the Defendants.

1st. The foreclosure of a mortgage by advertisement stands upon the same footing as a suit at law or a foreclosure in chancery, and the sale is equivalent to a final judgment or decree, and where the purchase money does not exceed the amount claimed in the notice of sale there is no surplus money and this action does not lie. *Bidwell vs. Whitney*, 4 *Minn. R.*, 516; *Banker vs. Brent*, *Id.*, 521.

2d. It was never heard that a party might in a court of law or equity litigate any matter involved in a final judgment or decree against him until after, upon a case made obtaining leave to defend, or getting the judgment or decree set aside; and there can be no claim made, that in this action there is a case made which would authorize the Court to do either, or

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that which would in effect amount to either of these things; because the complaint contains no averment of either mistake, inadvertance, surprise, fraud or collusion.

3rd. It is well settled upon authority that a party having an interest in an equity of redemption, although not made a party to a bill of foreclosure, is not entitled after final decree made, to an accounting, but is bound by the decree so far as that is concerned, unless he avers and proves that the same was procured through fraud or collusion. *Roswell vs. Simonton*, 2 *Carter Ind.*, 516; *Weedler vs. Deeble*, 1 *Ch. Cas.*, 299; *Sherman vs. Cox*, 3 *Ch. Rep.*, 46; *Haines vs. Beach*, 2 *John. Ch. R.*, 459; 2 *Spence Eq. Jur.*, 812.

II.—But if the facts stated in the complaint under any circumstances could be considered sufficient to authorize the court to permit the Plaintiff to have an accounting, or to set aside the sale; still he is not entitled to recover:

1st. The complaint shows that the Defendants at all times claimed that there was due to them upon the mortgage and for costs of sale $410, and at the time of the redemption by the Plaintiff claimed that amount with interest accruing after the sale, in all amounting to $459.20; that at that time and for aught that appears for a long time prior to the sale, the Plaintiff knew that in law and in fact there was but $260 due upon the mortgage, and yet with this knowledge and with a knowledge of all the facts in the case, he paid over the whole amount claimed by the Defendants.

The payment was therefore voluntary and no part of it can be recovered back either at law or in equity. *Mowatt vs. Wright*, 1 *Wend.*, 355; *Clarke vs. Dutcher*, 9 *Cow.*, 674; *Brisbane vs. Dacres*, 5 *Saund.*, 144; *Bibbie vs. Lumley*, 2 *East.*, 469; *Bulkely vs. Stewart*, 1 *Day.*, 133; *Lyon vs. Richmond*, 2 *John. Ch. R.*, 51, 59, 61.

In the case of *Bulkely vs. Stewart*, *supra*, the Supreme Court of Connecticut say: "This action does not lie to recover back money voluntarily paid on a claim which the party disputes though he pay it, expressly reserving his right to litigate his claim."

2d. It is no answer to say that the Plaintiff had no other alternative but to pay all the moneys demanded by the Defend-

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ants upon the redemption, or lose his lien upon the premises. Because (if he was not foreclosed by the sale from bringing an action to redeem,) a bill to redeem mortgaged land may be maintained without a previous payment or tender, if the mortgagor on request neglects or refuses to render his account. *Roby vs. Skinner*, 34 *Maine*, *4th Ed.*, 270; *Stapp vs. Phelps*, *7 Dana*, 300.

The assignment by Cook to the Plaintiff does not place him in any better position, for if Cook himself were the Plaintiff the same argument would apply with equal force to him; he could confer no greater right than he himself had.

The judgment of the Court below should be reversed.

Points and Authorities of Respondent.

The Court below properly overruled the demurrer of the Appellants. Because,

I.—It does not appear that there is any defect of parties defendant.

This ground of demurrer will lie only for a deficiency, not for an excess of parties. *Wallace vs. Eaton*, 5 *Howard*, *Prac. Reps.*, 99; *Goncelier vs. Foret*, *4th Minn. Rep.*, 13.

In the case at bar, the second mortgagor, Cook, has no interest in the matter, having assigned any right he might have to the Plaintiff. The first mortgagor, Moore, has assigned all his interest in the land to the second mortgagor, Cook. And the Sheriff, who sold the land, and received the redemption money, can have no interest in the matter, having already paid over the money. And moreover, in all that he did in the premises, he cannot be considered as performing any official act, but simply acting as the agent of the Appellants.

II.—The complaint does state facts sufficient to constitute a cause of action:

1st. The payment of the money by Respondent to Appellants was not made under such circumstances as to constitute "a voluntary payment," and thus estop the Respondent from maintaining an action to recover it back. *Fulham vs. Down*, *6th East. Rep.*

While it is true, as a general proposition, that a party is

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estopped by a voluntary payment of an illegal demand, yet the rule must be applied in each case according to the circumstances of that particular case. It is one of those rules in which "the circumstances of the case constitute the law of the case." *Duke de Cadoval vs. Collins*, 4*th Adol. & Ellis*, 858; *Payne vs. Chapman*, 4*th Adol. & Ellis*, 364.

To the point, that the Respondent was not estopped from recovering back money paid under such circumstances, see *Harmony vs. Bingham*, 2*d Kernan*, 99. Also cases there cited. Also, *Findley vs. Adams*, 2 *Day*, 369; *Riply vs. Gelston*, 9 *John.*, 201; *Clinton vs. Strong*, 9 *John.*, 369; *Elliott vs. Swartout*, 10 *Peters*, 137.

2d. The Respondent was not in any sense barred or concluded by the amount claimed by Appellants, as due on their mortgage, in the notice of sale. *Bidwell vs. Whitney*, 4 *Minn.*, 76; *Banker vs. Brent*, 4 *Minn.*, 521.

The Appellants claim that the foreclosure by advertisement stands upon the same footing as a foreclosure in Chancery. That the amount claimed in the notice of sale, if not objected to before sale is conclusive upon all parties having any interest in the premises; and that if they do not object before the sale it is final and conclusive against them, unless they make a case sufficient to open a judgment by default.

These positions they base on what we submit, is an erroneous assumption as to what was decided by this Court in the cases of *Bidwell vs. Whitney and Banker vs. Brent*, 4 *Min.*

These cases we respectfully submit do not decide as claimed by the Appellants.

The two cases above referred to were actions brought by the mortgagor to recover a constructive surplus where the mortgagee had bid in the property and no money was ever in fact received by him.

This action is brought by a subsequent incumbrancer for money actually received by the mortgagor.

Now admitting that as between the parties to the mortgage, the foreclosure is in the nature of a judicial proceeding and as conclusive as a judgment, we submit,—this is by no means true of a subsequent purchaser, who can in no sense be considered a party to these proceedings.

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The mortgagor has actual notice of the mortgage and of its conditions and is bound to know the consequence of a non-performance of its conditions. By the execution of the mortgage he may perhaps be considered in a condition analagous to one who has executed a warrant of attorney to confess judgment.

But a subsequent incumbrancer has not necessarily any actual notice of the existence of the prior mortgage, much less of the conditions of the note secured by it. He has no notice of the foreclosure proceedings, is not a party to or named in them. A party is entitled to his day in Court. Judicial proceedings will estop only the parties thereto, and a man cannot be estopped by their proceedings *in pais*, to which he is not a party. Nor is he required to excuse his neglect in not objecting to such proceedings, for he has been guilty of no laches.

Hence we claim that the remarks of the court as to the effect of a foreclosure are not and cannot be applicable to a subsequent purchaser.

As no notice of foreclosure by advertisement is required by our statutes to be served on subsequent purchasers, notice of such proceedings is not to be presumed against them. The presumption is that they had no notice of the proceedings.

SARGEANT & FRANKLIN, Counsel for Appellants.

BERRY & WATERMAN, and NORTON & MITCHELL, Counsel for Respondent.

By the Court. FLANDRAU, J.—The note to which the mortgage in this case is security, is disembarrassed of all questions of penalty, compound interest and similar issues that have characterized previous cases. It was simply a note for $390, dated on 3d day of October, 1856, and payable in one year from date. There can be no difference of opinion about the amount due on such a note, except through disagreement as to payments that may have been made, which is a mere question of fact. The mortgagee claimed in his notice of sale $381 25, a sum, according to the complaint which must be

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taken as true, double the amount due on the note. He became the purchaser himself, bidding the full amount claimed to be due. No money changed hands, which is usually the case in such transactions.

The previous cases decided by this Court have all arisen between the mortgagor and mortgagee in the mortgage that was foreclosed. This, however, is between the original mortgagee and a subsequent mortgagee of the same lands. We pointed out in the case of *Bidwell v. Whitney*, 4 *M. R., p.* 89, the various methods of relief open to even a mortgagor who had suffered a foreclosure to pass without objection, where the excessive amount claimed was in pursuance of his own express stipulations. A subsequent incumbrancer cannot be in a worse position. This foreclosure statute, it is true, makes no provision for notice being given to subsequent incumbrancers, other than such as is conveyed to them through the one published in the newspapers. However we may disapprove of the wisdom of such a provision, there can be very little doubt of the power of the Legislature to declare such a notice sufficient, and make it conclusive on all subsequently interested, and less doubt that such was the intention in this particular statute. It is expressly declared by section 17, that the conveyance made on the sale "shall be an entire bar of all claim or equity of redemption of the mortgagor, his heirs and representatives, and of all persons claiming under him or them by virtue of any title subsequent to such mortgage." Language could not be more explicit, and it can receive but one construction. In the cases of *Bidwell vs. Whitney*, 4 *M. R.*, 76, *and Banker vs. Brent.*, *Id.* 521, the mortgagors sought a recovery of money from the mortgagees, under circumstances which involved the repudiation of their express stipulations, which stipulations had been acted upon by the mortgagees, and such action acquiesced in. The mortgages were in all respects regular. The relief sought was, of course, denied, as inappropriate and inequitable.

In the case at bar, the proceedings on the part of the mortgagee, who foreclosed, were irregular and oppressive. He arbitrarily and wantonly claims a sum due about twice as great as the true sum. This, in itself, would be sufficient to set

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aside the sale. *Annan vs. Spencer*, 4 *M.R.*, 542. We have always held that a mortgagee should state, with substantial accuracy, the amount due at the date of the notice, and that in doing so he might, of course, compute such amount upon any basis of calculation justified by the terms of the note, and that a mortgagor who sought relief against penal or oppressive stipulations in the note, must urge his defence without delay, or be considered to have waived it. It is true in the case of *Bidwell vs. Whitney*, we treat the foreclosure, by way of illustration, upon the same terms as a suit at law or in equity, and so far as the mortgagee keeps within the terms of his power, such illustration and position are strictly correct. But when the mortgagee acts entirely outside the power conferred upon him, his acts can bind no one, and no waiver can accrue. In this case, viewing it upon the complaint alone, as we are obliged to do, there is no pretence for the claim made by the mortgagee under his power, and the act is, therefore, unauthorized, and without binding force. Whereas, in the cases cited from 4 *Minnesota Reports*, the claims were strictly within the terms of the power, and, consequently, binding, unless relieved against by a proper tribunal.

The second mortgagee does not seek to set aside the sale, as he, perhaps, could have done, but desires to redeem the land by paying to the mortgagor, who purchased it in, the sum actually due to him. Not being able to ascertain with certainty the amount due, he pays the whole amount, protesting against the excess, and brings his action to recover back all over the sum actually due, alleging it to be $199 20. He states every fact necessary to show that the mortgagee has violated the power of sale contained in the mortgage, and through such means extorted money from him which he was in no way entitled to. We think he can recover it back.

The judgment is affirmed.

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J. R. GARDNER, Respondent, *agt.* ARCHIBALD McCLURE, executor of the last will of NATHANIEL WRIGHT, deceased, impleaded with WILLIAM W. PELL, *et al.*, Appellants.

APPEAL FROM THE DISTRICT COURT OF NICOLLET COUNTY.

The deposit of title deeds of land, with a creditor, as security for a debt, even if accompanied with a writing stating the object of the deposit, will create no estate in the land in favor of the creditor, but merely gives him a lien on the deeds.

The English doctrine upon this subject repudiated, as having been founded in acknowledged error.

The Plaintiff sued by his initial letters, and not his full name. *Held*, bad practice, that may vitiate a judgment as against a purchaser of land, upon which it would otherwise be a lien, but that the defect cannot be reached by demurrer.

The complaint of the Plaintiff shows that the Defendant, William W. Pell, on the first day of September, A. D. 1857, executed to him the said Plaintiff, for a good and valuable consideration, a certain Promissory Note, of which the following is a copy:

"ST. PETER, Sept. 1st, 1857.

"$100.00. Ninety days after date I promise to pay to the order of J. R. Gardner, one hundred dollars, value received, with use at 4 per cent per month until paid.

"W. W. PELL."

That on the day of the date of the execution of the said note, the said Defendant Pell, was the owner of and lawfully seized of a good and indefeasible estate of inheritance in fee simple in lot No. one (1) in block No. one hundred and thirty-nine (139), in the Town of St. Peter, in Nicollet county and State of Minnesota, according to the plat of said town as recorded, &c. That said lot was purchased by said Pell of the St. Peter Company, a corporation duly incorporated by an act of the Legislature of the State of Minnesota, March 1st, A. D. 1856, which said company conveyed the said lot to said Defendant Pell, by deed of general warranty and the usual

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full covenants, on the 13th day of June, A. D. 1857, by deed of that date, duly acknowledged and delivered to the said Wm. W. Pell, whereby the St. Peter Company granted, bargained and sold the said premises to the said Plaintiff for a valuable consideration.

That on the first day of September, A. D. 1857, the said Defendant Pell gave, placed and put into the hands and possession of the Plaintiff, the said title deed of the said premises, as collateral security for the payment of the said promissory note; agreeing and stipulating at the same time to and with the said Plaintiff in writing that said title deed was deposited and should remain with and in possession of said Plaintiff as such security, of which agreement or stipulation the following is a copy:

"This is to certify that I have this day given to J. R. Gardner a Warrantee Deed to lot No. 1 in block 139, executed by the St. Peter Company, said deed not yet being recorded, dated March 1st, 1857. To have and to hold as security on the faithful payment of a certain promissory note even date with this, for one hundred dollars. And I do by these presents bind myself, my executors or assigns under the penalty of two hundred dollars that I will by no means defraud said Gardner by forcing said St. Peter Company to give me another deed of said lot or by any means whatever destroy said security in hands under the above named penalty."

That the said Defendant Pell has failed to comply with the terms of said promissory note by omitting to pay the same or any part thereof, which became due to him the said Plaintiff on the second day of December, 1857, and there is now justly due and owing to this Plaintiff by said Defendant Pell on said Promissory Note and the said Equitable Mortgage, the sum of two hundred and sixty-five dollars and thirty-three cents. That no proceedings have been had at law or otherwise for the recovery of the said sum secured by the deposit of said title deed or any part thereof.

That the said Plaintiff is informed and believes that the Defendant Archibald McClure and others (named in the complaint,) have or claim to have some interest in or lien upon the said premises or some part thereof, which interest or lien (if any) has accrued subsequent to the lien of this Plaintiff.

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That the interest, claim or lien of the last named Defendants (if any they have,) arise from a certain paper or instrument purporting to be a mortgage and bearing date the fourteenth day of October, 1857, executed by Defendant Pell to the said Nathaniel Wright, deceased, executed and purporting to be given to secure a prior existing indebtedness due from said Pell to the said Nathaniel Wright on a certain promissory note dated the 8th day of May, 1857, for the payment by the said Pell to the said Wright of the sum of three hundred and fifty dollars and interest in one year from the date thereof; which said note is described in the last mentioned mortgage, and which pretended mortgage as the Plaintiff is informed and believes was thereafter recorded in the office of the Register of Deeds of Nicollet county aforesaid.

But Plaintiff charges that at the time of the execution of the said mortgage and before the execution and delivery thereof to the said Wright, he, the said Wright, well knew and had full and actual knowledge and notice of the deposit of said title deed by said Pell with this Plaintiff, as security as aforesaid, and of all the facts and circumstances connected therewith as hereinbefore set forth.

The Plaintiff further says, that at the time of the execution of the said last mentioned mortgage, the said title and deed from said St. Peter Company to the said Pell, of the premises hereinbefore described, was the only title the said Pell then had to the said premises.

That there was no contract, deed or title then of record showing that said Pell had then or ever had any lien, claim or title in or to said lot.

The Plaintiff further alleges on information and belief, that the said Nathaniel Wright in his lifetime foreclosed or pretended to foreclose the said mortgage to him executed by Defendant Pell, and sold or pretended to sell the said lot in satisfaction of said mortgage, and under or by virtue of a certain proceeding had thereon for that purpose.

The Plaintiff further states on information and belief that the proceedings in pursuance or by virtue of which the said lot was so sold or pretended to be sold, was a suit in Chancery or civil action in this court, to which suit the said Nathaniel

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Wright and Defendant Pell and Ann E. Pell his wife, were parties, a judgment or decree rendered in satisfaction and entered in the Judgment Book for the said District Court of the county of Nicollet, in the office of the clerk of said Court, on the 17th day of May, 1859, and a published notice of such sale. That by said judgment and decree the said premises were ordered and adjudged to be sold. That under or by virtue of said judgment or decree the said Wright made or pretended to make a public sale thereof, that such sale was made on the 2d day of July, A. D. 1859, that at such sale the said Wright pretended to purchase and bid off the said lot. That said lot was by the auctioneer at such sale declared to be sold to and was struck off to said Wright. That said lot was conveyed to said Wright by Sheriff's Deed bearing date of July 2d, 1859, and which said deed was recorded in the office of the Register of Deeds of said county of Nicollet, on the 1st day of August 1859, in Book E of Deeds, pages 111 and 112.

The Plaintiff further alleges that he the said Plaintiff was not a party to said suit or action, and was never served with process, nor appeared therein; and that the said suit or action, the decree or judgment and all proceedings had therein under or by virtue thereof, were fraudulent and void as to him. The Plaintiff further says that on the public sale aforesaid, the said Wright paid no new or further consideration for the said lot, and that he the said Wright nor his estate since he deceased, nor any of the Defendants herein had any right, title, interest or lien in, to or upon said land save and except by and through the said mortgage so executed to the said Wright. And that the only consideration paid therefor was the said prior indebtedness if any there was.

The Plaintiff further shows that the said Nathaniel Wright is now dead; that the Defendant Archibald McClure is the executor of his estate and last will and testament, duly qualified, and that the other Defendants hereinbefore named, claim to have an interest therein.

Wherefore Plaintiff demands that the mortgage executed by Defendant Pell to said Wright, be declared a subsequent lien to the equitable mortgage and lien of this Plaintiff, or

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that the same and all proceedings thereon by virtue or in pursuance thereof, be adjudged fraudulent and void as to or against this Plaintiff.

That the Defendants and all persons claiming under them or either of them subsequent to the commencement of this action, may be barred and foreclosed of all right, claim, lien and equity of redemption in the said mortgaged premises.

That the said premises may be decreed to be sold according to law, and that out of the proceeds of such sale, the Plaintiff may be paid the amount due on his said note with interest to the time of such payment and the costs and expenses of this suit, so far as the proceeds of such sale will pay the same, and that the said Defendant Pell may be adjudged to pay any deficiencies which may remain, and that he the said Plaintiff may have such other or further relief or both in this action as shall be just and equitable.

The Defendant Archibald McClure, sole executor, &c., demurred to the complaint upon the following grounds:

1. That the said complaint does not state facts sufficient to constitute a cause of action.

2. That the said complaint does not state facts sufficient to entitle the Plaintiff to the relief, by him, in and by the said complaint demanded, or any part thereof.

3. That the facts, stated in the said complaint, do not, at law or in equity, constitute or create any interest or estate in, or lien or incumbrance upon, the premises therein described, in favor of the Plaintiff.

4. That an equitable mortgage or lien upon real estate for the security of the payment of a debt, cannot, by the laws of this State, be created by a deposit of title deeds with the creditor, in manner and form alleged in the said complaint.

5. That there is a defect of party Plaintiff in this, to-wit: that "J. R. Gardner" is not, in the law, the name of a party or person, and does not, in the law, identify any party or person having the legal capacity to sue. An initial letter is not a name within the meaning of the statute.

The demurrer was overruled and Defendant appealed.

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Points and Authorities of Appellant.

I.—It does not appear by the complaint that the Plaintiff at the time when Pell deposited with him the title deed, made any advance of money to Pell, or that he then held unpaid any actual debt against Pell. By the English rule in equity, an actual advance of money at the time, or an actual pre-existing *bona fide* indebtedness, is absolutely necessary to sustain an equitable mortgage by the deposit of title deeds of the estate. *Miller on Equitable Mortgages*, 27 *to* 73; *Coote on Mort.*, 165 *to* 175; 2 *Crabb on Real Property*, 849, *sec.* 2203; *Cross on Law of Lien*, 143 *to* 168, *ch.* 10; 1 *Leading Cases in Eq.*, 440 *and note*; *Smith on Real and Personal Property*, 305; 2 *Story's Eq. Ju.*, *sec.* 1020; 4 *Kent's Com.*, 150, 2*d Ed.* And wherever in this country the rule has been adopted, it has been founded wholly on English precedents. 2 *Story's Eq. Ju.*, *sec.* 1020; 1 *Leading Cas. in Eq.*, 465, (*Law Lib. vol.* 40); 2 *Sand. R.*, 9, 12; 2 *Hill's Ch.*, 166; 10 *Smedes' & Mar. R.*, 418; 8 *B. Monroe R.*, 435; 1 *Rawle R.*, 325; 4 *Kent's Com.*, 150, 2*d Ed.*

II.—The complaint in this case alleges that Pell, for a valuable consideration, executed and delivered a promissory note of even date with the deposit of the deed as security for the payment thereof, and it does not allege anything more touching the consideration. It is not sufficient, for every fact alleged might be sustained on the foundation of a single dollar. The doctrine of such equitable mortgages, is not favored anywhere, and it never has been, and never ought to be, applied, unless the party seeking its benefits, complies strictly with all its requisitions, and alleges affirmatively every fact necessary to entitle him to such benefits. He must not leave anything to inference or in doubt.

III.—The Plaintiff in this case does not allege that the said title deed has, ever since the deposit, remained in his possession, or that it was in his possession at the time of the commencement of this action. *Non constat*, except by inference or implication, that he still holds the deed under the deposit in pledge.

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The authorities before cited sustain also the proposition contained in this point. As to the doctrine of express pledges, see *Cross on Law of Lien*, 63 *to* 77, *ch.* 3; 4 *Kent's Com.*, 138, 2*d Ed.*, *sec.* 58; 1 *Parsons on Cont.*, 594; 4 *Barb. R.*, 491; *Smith on Real and Personal Prop.*, 307.

IV.—The doctrine of equitable mortgages, created by deposit of title deeds, does not obtain or prevail in this state. The reasons on which it was founded and established in England, do not exist here, nor do the reasons on which it has been sustained and continued there, (reasons very different from those on which the precedent set, rested,) nor are the laws which gave force and effect to those reasons there, in force here. And besides, the statutes of conveyances and of frauds of this State, preclude the doctrine and prevent its application. *Comp. Stat.*, 396, *ch.* 35—457, *ch.* 49, *sec.* 6.

V.—The instrument in writing executed by Pell under his hand and seal, and copied into the complaint, does not take the case out of the operation of those statutes. It is insufficient for such purpose. It does not, in its terms, pretend to create any interest or estate in or lien upon the land described in the deed. It purports to reach only the deed,—the paper,—and the possession of it; and its language cannot, under the ordinary rules applicable to written evidence, be extended to the title, or at all, by construction or implication. It is not a "deed or conveyance in writing * * * creating, granting, assigning, surrendering or declaring" any "estate or interest in lands" within the provisions of the said statutes of conveyances and of frauds; but a mortgage is such deed or conveyance. Nor is the said instrument witnessed by two subscribing witnesses—which is a statutory necessity to a "deed of conveyance" of lands in this state.

VI.—The doctrine on which the claim made by Plaintiff in his complaint rests, is contrary to the policy of the land laws and registry laws of this state, and ought not to be recognized or countenanced by its courts. Several of the states have rejected the doctrine and refused to entertain or adopt the rule, nor is it universal in Great Britain. Scotland repudiates it. 3 *Penrose & Watt's*, 239; 3 *Barr. R.*, 233; 8 *B. Monroe R.*, 435.

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VII.—There is not any definite or certain name of a party Plaintiff in this action. The law requires at least one christian name of a party to proceedings in Courts of Justice, and an initial letter is not a name.

Points and Authorities for Respondent.

I.—An equitable mortgage by deposit of title deeds is supported by a contract for future advances. *Coote on Mort.*, 169, 170, *side pages*. And also for the security of a collateral or contingent liability. In short, whatever will support a contract will support an equitable mortgage, and there is no such English rule as is pretended. 4 *Kent's Com., p.* 154, *8th Edition*.

II.—The objection to the consideration may be plainly stated as follows: The consideration for the note secured by the deposit of the title deeds is not detailed or affirmatively set forth in the complaint so as to discover its kind and nature. If this was ever required in equity pleadings (for which I can find no authority and have looked for it in vain,) it is most certainly abrogated by the code and the act providing for uniformity of pleadings. *Van Sant. Pl.*, 219, 220, 221; 1 *Chit Pl.*, 292–3 *n*.

Again, no presumption such as that the note was not for an adequate consideration, or that it was got up for a "made" case by collusion of the parties to amuse themselves at the expense of the Court will be indulged. *Van Sant. Pl.*, 775.

Any such suppositions if believed by the Appellants might have been set up by way of defence, but the Court will hardly indulge in them for any one's benefit.

It is sufficient if it appears from the complaint or the instrument plead, that there was a consideration for the contract. Story, in his Pleadings, in enumerating when a demurrer will lie to a bill in equity, says, that if it should appear that there was no consideration, a demurrer would undoubtedly lie. *p.* 472, *sec.* 503.

The complaint shows an indebtedness, deposit of title deeds and a contract; these, under the main doctrine give title irrespective of the present whereabouts or location of the docu-

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ument, provided the title and lien have not been abandoned, or transferred and conveyed by contract. The question concerning the abandonment or transfer of the title in the case at bar, and the loss of Gardner's rights therein can be raised only by disputing that Gardner is the Plaintiff in interest, which must be done in all cases by answer, unless it appear from the complaint that he is not.

Whether the demurrer shall stand or fall depends upon the law of equitable mortgages by deposit of title deeds and whether that law is the law of the land.

III.—On the main controversy we submit these points:

1. The deposit of title deeds to secure an indebtedness constitutes an equitable mortgage according to the English law. We suppose that this will be admitted, but refer to the authorities for the rule to aid us in discussing its application in the case at bar.

The first case in which this doctrine was fully established was *Russel vs. Russel* decided by Lord Loughborough in in 1783, reported in 1 *Bro.*, 238. This decision has been persistently sustained notwithstanding the course of Lord Eldon and Sir William Grant, and is now the established law of Great Britain.

There is hardly a report that does not contain some decision upholding it, and all the text books recite it as the law. *See* 1 *Hill. Real Property*, 490, *and notes* 2 *and* 3, citing sixteen different cases, *Id.*, 491, *sec.* 5–6–7; 1 *Hill. on Mort.*, 601, *sec.* 7 *and* 8, *and note c*; *Id.*, 602, *sec.* 9, *p.* 603, *sec.* 10, 11; *Id.*, 603, *sec.* 13, 16, 19, *and* 19 *a*; *Whitworth vs. Grange*, 3 *How.*, 416, 424, 429; *Adam's Eq.*, 123 (*side pages,*) *to* 126; *Willard's Eq.*, 440 *and* 441; 4 *Kent's Com.*, 149 *to* 151.

2. Does this doctrine prevail in the United States? Most indisputably it does. *Howard vs. Agy*, 9 *Mass.* 179; *Rockwell vs. Hobby*, 2 *Sand. Ch. R.*, 9; *Day vs. Perkins*, *Ib.*, 359; *Welch vs. Usher*, 2 *Hill. Eq.*, 170; *Hall vs. McDuff*, 11 *Shepl. Me. R.*, 311; *Clabough vs. Byerly*, 7 *Gill.*, (*M. D.*) 354; 4 *Wend.*, 369; 1 *J. C.*, 114; 2 *J. Ch. R.*, 603; 1 *do.* 394.

The rule is also recognized by the Supreme Court of the United States. *Mandeville vs. Welch*, 5 *Wheat.*, 284; 1 *Hill. on Mort.*, 605, *sec.* 15.

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It is also adopted in Mississippi and Louisiana,also in South Carolina.

There can be no question at this late day after the innumerable decisions in which the point has been involved and overruled, that the statute of frauds does not apply. 2 *Story's Eq.*, 1020; *Rollerton vs. Morton*, 1 *Gra. & Wat.*, 195; 1 *Hill. on Mort.*, *p.* 603, *secs.* 10–11–12–13, containing a digest of the case of *Keys vs. Williams*, 3 *Y. & Coll. Ex. Ch. Rep.*, 60 and 61, expounds and vindicates the whole doctrine and policy.

So the memorandum is sufficient to take the case at bar out of the statute if it would have been within it, had it been on a parol agreement. The memorandum avoids the necessity of a resort to parol testimony to prove the contract which it is the object of the statute to avoid. *Exparte Haigh*, 11 *Ves*, 403–4; *Exparte Laughton*, 17 *Ves.*, 230; 1 *Hill. on Mort.*, *p.* 607, *sec.* 20; *Cross on Lien*, 104–5, 118; *Coote on Mort.*, (169,) 216–17; *Heirn vs. Mill*, 13 *Ves. Ju.*, 115.

The Appellants' attorneys take the objection that the memorandum is not a deed or "conveyance" within the meaning of our *Statute of Frauds*, *p.* 457, *sec.* 6. It is not essential to a conveyance in writing that it should describe the premises. Any instrument that declares the intention of the parties in writing, to which intention or the acts thereby performed the Courts and the law give the force of a title or conveyance, is sufficient. 1 *Vol. Wharton Law Dic.*, *p.* 210; *Coote on Mort.*, 217; *Cross on Lien*, 118, *top pages.*

But it is not proper to apply the strictly law rules for the construction of the Statute of Frauds to the equity side of the court, to the investigation of equitable claims. The rules are essentially different. *Hill. on Trustees*, *p.* 259, (*top notation*), and 171 (*side notation*).

IV.—The seventh objection, if ground of demurrer, can only be taken under *subdivision* 4 *of sec.* 65, *p.* 540 *of Comp. Stats.*, and that relates to parties and not to the spelling of names. But *sec.* 96 *of p.* 544 *of the Statutes*, settles that frivolous objection about names if an error in the slightest degree. And who can say the Respondent's mother did not call him by the same designation that we do. Certainly

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it is his common well known name and alike known by himself and by all others.

CHATFIELD & BUELL, Counsel for Appellant.

AUSTIN & WARNER, Counsel for Respondent.

By the Court—FLANDRAU, J.—The English statute of frauds and perjuries enacted as follows: That no "action shall be brought upon any contract or sale of lands, tenements or hereditaments, or of any interest in or concerning them, unless the agreement upon which such action shall be brought, or memorandum or note thereof, be in writing and signed," &c. It was customary for parties borrowing money, to secure the creditor by depositing with him the title deeds of land. Sometimes these deposits were accompanied with a written memorandum stating the purpose for which they were made, and sometimes they were entirely without writing. Prior to the registry acts, such deposits furnished creditors with a valuable security by giving them a lien upon the deeds themselves, without creating any interest or estate in the lands, because the owner could not recover possession of the deeds without paying off the incumbrance, and he could not conveniently deal with the land without them. It was similar to a solicitor's lien, viz: a right to hold the deeds so as to enforce payment by embarrassing the debtor, but unaccompanied by any charge upon the estate. *Adams' Eq.*, 323. Had such securities been confined to the deeds alone, no infraction of the Statute of Frauds would have occurred. But the Courts, desirous probably of carrying out what they considered the intention of the parties, circumvented the plain provisions of the statute of frauds by creating the fiction that the deposit of the deeds with the creditor was in itself evidence not only that the deeds were to operate as a security, but such security was to be effectuated by a mortgage. *Adams' Eq.*, 334. This was first so held in the case of *Russel vs. Russel*, 1 *Bro. C. C.*, 269. It was followed by *Featherstone vs. Fenwick and Harford vs. Carpenter*, 1 *Bro. C. C.*, 269, *note*, and *Birch vs. Ellames*, 2 *Aust.*, and became the settled law of

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England. For the history of the rise and progress of this doctrine, see *Coote on Mort. ch.* 9, *p.* 165; 1 *Maddock's Ch.*, 537; *Cross on the law of lien, ch.* 10, *p.* 143; 4 *Kent's Com.*, 154; 2 *Story's Eq. Jur., sec.* 1020; *Adams' Doctrine of Eq.*, 333; 1 *Hill. on Mort., p.* 599. These writers all concur as to the origin of the doctrine being with the case of *Russel vs. Russell*, and they are equally harmonious in their expressions of regret that it ever was adopted, whenever they indulge in any comments upon the subject. It has always been a source of profound regret also to the equity Judges of England who have followed Lord Thurlow, that he decided the case of *Russel vs. Russel* as he did.

In the case of *Exparte Hooper*, 19 *Ves.*, 477-8-9, Lord Eldon, the most experienced of the Lord Chancellors of England, said, "with great deference to Lord Thurlow, who first held that the deposit of a deed necessarily implied an agreement for a mortgage, I repeat that this decision has produced considerable mischief; and that the case of *Russel vs. Russel* ought not to have been decided as it was. And again in *Exparte Whitread*, 19 *Ves. Jun.*, 211, he said that in his opinion the judicial decisions establishing this doctrine approach to a virtual repeal of the statute of frauds; and while he admitted that he was bound by the decisions, he refused to extend them any further. See also, *exparte Kensington*, 2 *Ves. & Bea.*, 83.

In *Norris vs. Wilkinson*, 12 *Ves. Jun.*, 192, Sir William Grant expresses great disapprobation of the doctrine, and thinks it a violation of the statute of frauds. See also *Exparte Haigh*, 11 *Ves. Jun.*, 403. In *Adams' Eq.*, 334, the author declares the conclusion by which the implied agreement for a mortgage is arrived at to be unsatisfactory.

In *Maddock's Chancery, vol.* 1, 538, it is declared that the explanation by parol of a deposit of title deeds has often been lamented. He says "deposits are not favored especially when contradicting a written instrument. It were well perhaps if no such mortgages were permitted; they seem contrary to the spirit and letter of the Statute of Frauds," &c. 1 *Meriv., p.* 9; *Exparte Combe*, 17 *Ves.*, 369.

In *Coote on Mortgages*, 222, the author, after going fully over the cases, makes the following comments as the result of

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his observations and researches: "On a review of the decided cases establishing this mode of mortgage security, it is, perhaps, to be regretted, that the old law was not adhered to, and the principle upon which the Statute of Frauds was founded, more respected. For, although equity, by declaring the deposit itself to be evidence of an agreement executed, has contrived to evade the strict and literal wording of the statute; yet it is manifest that the door has been in some degree open to fraud and perjury."

The regrets expressed by the Judges and elementary writers were, more particularly, addressed to those cases which hold that the mere deposit, without any writing, declaring the design and purpose with which it is made, may be shown by parol to create a mortgage upon the land, than to those cases in which the deposit is accompanied by a memorandum in writing, as in the case at bar. Yet, unless the writing is sufficient in its terms, and manner of execution, to create the interest or estate in the lands intended by the parties, the distinction is unsound, and the Statute of Frauds presents an obstacle as insuperable in the one case as in the other. The instrument that was executed by Pell at the time of the deposit, does not pretend to create any interest in the land described in the deed deposited, but refers solely to the deed itself, and is entirely clear. It is not executed with the forms required by the statute to pass an interest in real estate. *Shaubhut vs. Parrot*, decided July Term, 1861; and it is as much an infringement of the Statute of Frauds to hold that such a writing can create a mortgage upon the land, as it was in *Russel vs. Russel*, where the title deed was deposited without any writing.

Our statutes on this subject are more exacting than that of England at the time of the decision of *Russel vs. Russel*, *Comp. Stats.*, 396; *Id.*, 457, *sec.* 6, *Id.*, 400, *sec.* 30.

The doctrine established by the English cases seems to have been adopted in some of the United States and rejected by others. It is unnecessary, and, perhaps, unprofitable, to attempt to discover which way the weight of authority lies. The custom of giving such security has never obtained in this country to any extent, and never can, as long as we adhere to

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our system of registering all titles to land. The important question for our determination is, whether we should admit the binding authority of precedents confessedly founded in error, and fasten upon our young State the antiquated heresy that has been productive of nothing but evil for three quarters of a century.

Were we in the situation in which Lord Eldon found himself when he was called upon to decide the same question, we would not hesitate a moment. The rule *stare decisis et non quieta movere*, we regard as of quite as much importance as any in the administration of justice. Had our predecessors adopted this rule, it would have been infinitely better to stand by their decision than to depart from it, even if we doubted the soundness of their holding. Any commercial question is much better settled in a manner so that all men may act upon it, than to be left fluctuating between conflicting decisions, and this, even if it is settled upon principles of questionable authority. Nothing would be more painful to me than to see a spirit arise in the State to unsettle judicial determination, and nothing can be more disastrous to the business interests of the country. We think, therefore, that whenever a question is presented for the first time, and we become satisfied that the courts in England, or in any of the States, have adhered to a rule which they confess to be erroneous, simply because they are bound by precedents of their own making, it is our duty, as well as our privilege, without violating any rule of decision, to adopt the view most consonant with reason and principle, in order that our successors may not be tempted, when the question arises again, to emancipate the State from the shackles of venerable error, by doing then, what we should do now.

In the case of *Selby vs. Stanley*, 4 *Minn. R.* 74, we were discussing a question where it was manifest that the English courts had adopted and adhered to a rule which they admitted was not the best one, but from which they could not depart.

In accepting the principle, which they regretted had not been adopted in the beginning, we made use of this language which is applicable to the case at bar. "In a new State like our own, we enjoy the advantage of all the light which has

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been thrown upon questions, without being tied down by precedents which are admitted to be founded in error; and, therefore, we are free to select, as a basis of our decision, whatever may appear to be founded on principle and reason, rejecting what is spurious and unsound, even if dignified by age, and the forced recoguition of more learned and alle Judges."

It is our opinion that the deposit of the deeds, and the execution of the accompanying writing, did not create any interest in the land in favor of the depositary.

The Defendant objects to the complaint on the ground that the Plaintiff sues by his initial letters, and not his full name. We could not say, from a mere inspection of the record, that such was the case. The Plaintiff may have adopted the name under which he sues. If, however, a Defendant who has a Christian name, of which "J." is the initial, should be sued, and judgment taken against him by such initial letter, very serious questions might arise as to whether subsequent purchases would be bound to know that the judgment was against the land of John, Jacob, or James, or whether they would be bound to notice such a judgment at all. It is very bad practice to designate either Plaintiff or Defendant by the initial letters of their names in a judicial proceeding; but a demurrer will not lie for the defect.

Order overruling demurrer reversed, and judgment ordered for Defendant.

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SCHALCK & FENSKE and CARL SCHRAUMN, Appellants, *vs.* HARMON, AIKEN & GALE, Respondents.

APPEAL FROM THE DISTRICT COURT OF BROWN COUNTY.

Under the act of March 8, 1860, *Laws of* 1860, *p.* 216, a party who has taken security for a debt in any of the ways enumerated in the act, cannot maintain an action upon the debt until he has first exhausted his securities. But where he takes an assignment of what he supposes to be a valuable interest in property as security, and afterwards discovers that it is of no value, he is not driven to a fruitless effort to realise upon the pretended security in the first instance, but may at once commence his action upon the original debt, and if the existence of the security is pleaded in abatement of the suit he may allege in reply that the security was valueless, and in fact no security, and upon establishing such fact upon the trial, he may have a judgment for the original demand.

Points and Authorities for Appellants.

I.—The Respondents ought not to recover in this action. The judgment below was contrary to law.

1. Because no suit can be brought in a case such as the one before the Court, where special security is taken after the maturity of the debt providing specially for its payment, without going first upon the security.

2. The Plaintiffs (Respondents,) having accepted the special security from the Appellants under written conditions that out of the security the existing debt should be paid, were bound in law, first to exhaust the security before resorting to the general property of the Appellants, or the Appellants personally. *Burr. on Assign'ts, p.* 128; 2 *Min. R.*, 44; *Stevens vs. Bill*, 6 *Miss. R.;* 1 *Min. R.*, 246; *R. S. Min.*, 333, *sec.* 29; 3 *Min. R.*, 17 (*Willis vs. Davis*); *Bresks vs. Stenen*, 10 *Paige, p.* 11, *and notes to that case*; *Session L. March* 8, 1860, *p.* 216, *sec.* 1 *and* 2; *Burrill on Assignments, pp.* 37 *to* 44; *Harrison vs. Sterry*, 5 *Cranch. S. C. R., p.* 289, *et seq*; *Willis vs. Barber*, 4 *Day.*, 42, 429, 430.

3. No suit by Respondents can be maintained against the Appellants when such security has been lost by the carelessness or negligence of the Respondents,—the assignees. The

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security is the first reliance of the creditor in such cases. *Story on Bailments, p.* 76 *to* 81, *but see p.* 29, 30, 31; *Pothier on Obligations*, 142, *note* (*n*); 3 *Kent., p.* 578, 579; 1 *Min. R.*, 246; *Rev. Stat., p.* 333; *Burrill on Assignments, p.* 128, 129, 184, 423, 424, 431, 438, 440, 472, 525, 526; 8 *How.*, 414; *Story on Partnership, secs.* 96, 326, 360, 3 *Kent, note, p.* 78.

II.—1. If the security is lost by the negligence or misconduct of the Plaintiffs, (Respondents,) it will constitute a good defence *pro tanto* to the Plaintiffs' claim. *Pub. Stat. Minn.*, 581, *secs.* 70-1-2 3-4-5, *and subdivisions*; 6 *Ohio State Reports*, 216.

2. The Plaintiffs having made Rehfeld their agent by operation of law, were bound by his acts connected with the agency. 1 *John.'s Cases, p.* 110; 12 *John.'s R*, 300; 6 *Mass. R.*, 193; 2 *Kent's Com., p.* 614, 616. This principle is too plain to need argument or authorities.

III.—1. Judgment cannot be taken for more than the amount demanded in the complaint, especially when judgment is taken upon the papers without the verdict of a jury. Judgment is demanded for $1,074.45. Judgment is taken for $1,110.34. Judgment and costs for $1,114.56.

2. Judgment is taken against Carl Schraumn as principal, when the pleadings show that he was only a security without any consideration. And it appears in the pleadings that security had been taken by the Plaintiffs from the principals, after the debt was past due. And this security has been released or has been lost by the acts of the Plaintiffs.

3. There is no allegation in the complaint of demand or protest to bind the security.

For these reasons Appellants ask that judgment be reversed and the case remanded to the county of Brown for further proceedings.

Points and Authorities of Respondent.

The Plaintiffs were entitled to judgment in the Court below, because:

I.—The pleadings do not allege payment, but only that certain undetermined interests were assigned "as collateral se-

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curity" for the purpose of "securing the payment of said notes."

* * * "Both at law and in equity a mortgage is considered a mere security for money." *Cow. Dig.*, 388, *and* 2 *Cow. R.*, 195; 15 *J. R.*, 319; *Jackson ex dem Norton v. Willard*, 4 *J. R.*, 41; 7 *Cow.*, 662, *Dig.* 394.

The taking of collateral security by the holder, from the maker of the note, will not be any defence to suit brought on the note. *Story on Prom. Notes, sec.* 411.

II.—The pleadings nowhere show or charge that the Plaintiffs Harmon, Aiken & Gale ever owned the goods or interests named in the said chattel mortgage or that possession of any interest whatever was transferred to them.

"The execution and delivery of a mortgage does not divest the mortgagors of the legal title." *Wicox Dig.*, 372; 2 *Ohio R.*, 233-4; *Cow. Dig.*, 388, 33; 2 *Cow.*, 246.

A mortgagor is the owner of the property mortgaged against all the world. *Wend. Dig.*, 441, 448; 5 *Wend.*, 603.

III.—The collateral security set forth in the answer cannot be used as a set-off, because further,—

1. Fr. Rehfeld in whose possession the goods are alleged to have been, is not a party to this action.

"It is a general rule that debts or demands between persons who are not parties to the suit cannot be set off." 2 *Cow. Tr.*, 179.

2. It does not appear that there was ever a final balance struck and agreed to between the co-partners Rehfeld, Schalck & Fenske.

3. It does nowhere appear in the pleadings that Rehfeld ever consented to the assignment by Schalck and Fenske of their interests in the partnership concerns, or that he was ever notified thereof.

4. It does appear by the pleadings that Rehfeld was properly in possession of the "collateral security" set up in the answer, and that the debts of said Rehfeld, Fenske & Co. remained unpaid at the time of the assignment of the said collateral.

5. It does not appear in the pleadings that the Plaintiffs Harmon, Aiken & Gale ever agreed to settle up the partner-

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ship accounts of Rehfield, Fenske & Co., nor that they ever received any consideration for so doing, neither does it appear that they ever made Rehfield their Agent.

6. There was nothing pledged and no delivery of any tangible thing whereby the Plaintiffs could realize.

It does not appear that Schalck & Fenske ever gave H, Aiken & Gale any order on Rehfeld for the lumber or their other interests.

"A written order from seller by buyer, directing a person who has care of goods to deliver to vendee, is a delivery; but it is necessary that he who holds the goods should recognize the order and assent to retain them for vendee." *Chitty on Cont.*, 390.

Where something remains to be done for the purpose of ascertaining either the quality or price of the article sold, the property does not pass (6 *Cow.*, 250; *Chitty on Cont.*, 379,) either to distinguish the goods or ascertain the quantity or price. 15 *John.*, 349; 6 *Cow.*, 250; 3 *Wend.*, 112; 7 *Cow. and* 7 *Wend.*, 406.

IV.—The value of the property assigned as collateral is and was unliquidated and undetermined, and cannot be used as a set off to this action on a promissory note.

D. G. Shilloch, and Cox & Bryant, Counsel for Appellants.

D. S. Griffin and Thomas Cowan, Counsel for Respondents.

By the Court—Flandrau, J.—Judgment having been granted in favor of the Plaintiffs upon the pleadings alone, the question presented, is, whether the answer discloses any defence admitting it to be true. The facts stated in the answer are substantially, that the Defendants Schalck & Fenske, on the 1st day of November, 1858, entered into partnership with one Rehfeld in the milling business, for the term of eight months to expire on the first day of July, 1859. Each member enjoyed an equal interest in the concern. The firm transacted business under the name of "Rehfeld, Fenske & Co." On the first day of July, 1859, the partnership was dissolved by its own limitation, and its assets were as follows: Rehfeld

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owed it $2,500.00. Other parties owed it $3,000.00, and it had lumber to the value of $800.00. Its liabilities were a debt to Schalck & Fenske of $1,107.05, and to other parties debts to the amount of $400.00. The assets therefore exceeded the debts of the concern $4,792.95. The copartnership was solvent at the time of the dissolution, and continued in the same condition until the time the Defendants Schalck & Fenske assigned their interest to the Plaintiffs to secure their separate debt. This assignment transferred to the Plaintiffs all the interest that Schalck & Fenske had in the assets of the firm of Rehfeld, Fenske & Co., and was made to secure the two notes upon which this action is brought, and another note for $149.28 due from Schalck & Fenske to the Plaintiffs.

This brings us to an examination of the relative rights of the parties at the time this transaction took place, in order that we may determine what interest, if any, passed under the assignment, and whether it can be set up as against an action on the notes.

When a partnership is dissolved by the efflux of time, it is only dissolved so far as the continuance of the business for which it was originally created is concerned; but it continues for the purpose of closing up the business of the house, and each partner is in full possession of power (unless it is expressly confided to some other person) to pay and collect debts due to the partnership, to apply the partnership funds and effects to the discharge of their own debts; to adjust and settle the unliquidated debts of the partnership, and to do all other acts necessary to the winding up of all unsettled matters connected with the partnership affairs. *Story on Partnership, sec.* 328, *note* 3.

The interest which each partner has in the assets, is his distributive share after all the debts of the firm are paid and satisfied out of them. This may be a valuable interest, or it may not be worth anything, depending as it does upon the result of the settlement of the concern. Each partner has a lien upon the assets to the end that they shall be first applied to the payment of the firm debts. The firm creditors have no lien upon the assets which entitles them to priority of payment, but their preference is worked out through the

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lien which the partners themselves possess. *Story on Part.*, *sec.* 326, *and note* 1.

This interest of a partner in the property of the partnership is the subject of levy and sale on execution, and may be assigned by the partner. When it is sold or assigned, the purchaser takes exactly the interest that the partner owned, no more, no less. He, however, does not become a partner in the firm by virtue of his purchase, but a tenant in common with the other partner or partners. 1 *Am. L. C.*, 469; *note by Hare & Wallace*; *Phillips v. Cook*, 24 *Wend.*, 338. The purchaser has no right to assume the settlement of the partnership concerns: that right rests with the remaining partner, and confers upon him the right to the possession of the books and papers of the firm, and its property, to enable him to wind up the business. *Matter of Smith*, 16 *John. R.*, 102. As to the distinction in such cases between partners and tenants in common, see *Mersereau vs. Norton*, 15 *John. R.*, 179; *Caldwell vs. Auger & Hebert*, 4 *Minn. R.* 217.

The answer alleges that Rehfeld has converted the lumber into money, realizing thereon $800.00, and that he has also collected $2,000 of the debts due to the partnership. Now if this is true, and the debts of the firm are only $400, exclusive of the debt due to Schalck & Fenske, then on an accounting between the Plaintiffs and Rehfeld, there would be an ample fund from which to pay the Plaintiff's debt, as none of the assets would go to Rehfeld except in reduction of his debt due the firm; and none would go to the Defendants until the Plaintiffs, who represent their whole interest, were paid in full.

These allegations, in the answer alone, constitute a defence since the act of March 8, 1860, which will be hereafter noticed. Those portions of it which charge that the Defendants warned the Plaintiffs against allowing Rehfeld to take possession of the property and collect the debts, have no influence whatever upon the question, because no reason is alleged why Rehfeld should not do exactly as he did. The answer makes no charge against him of insolvency, incompetency or misconduct, and being a partner, he was fully empowered to settle the partnership affairs.

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We are cited by the counsel for the Defendants to the act of March 8, 1860, *p.* 216, *Laws* 1860, upon which act they insist that the Plaintiffs cannot maintain an action upon the notes until they have first exhausted their security. This position is correct where it appears clearly that one of the several securities mentioned in the act have been taken. We so held in the case of *Fletcher v. Swift*, decided at the present term. But in this case the question is presented in a different aspect. Here the answer charges the giving and acceptance of the security, and sets out a statement of the partnership concerns which show that it was available in the hands of the Plaintiffs. The reply admits the assignment of the Defendant's interest in the partnership assets, but avers that the Plaintiffs never have received any of the property or collected any of the debts, and that the property was no more than sufficient to pay the firm liabilities, and the debts were worthless. It also denies the allegations of the answer, that Rehfeld had realized from the assets. Here is an admission of the taking and acceptance of the pretended security, and a denial of its being of any value. It does not follow that the mere execution of papers that are designed to create a security, shall prevent a party from maintaining an action on the original demand if it turns out that the security is worthless; not merely that it is inadequate, but that it is unavailing for any purpose—as if, for instance, a chattel mortgage should be given upon articles which were not the property of the mortgagor; or the existence of any other state of facts that would operate an entire failure of the collateral security. In such cases it would be senseless to hold that a Plaintiff should first exhaust a security, that it was manifest was no security at all.

An analogous principle was recognized by this Court in the case of *Moss vs. Pettingill* 3 *Minn. R.*, 217. Pettingill had recovered a judgment against Myrick, Moss and others, upon a promissory note. Moss occupied the relation of surety to Myrick, upon the note. An execution was levied by Pettingill on the property of a firm in which Myrick was a partner. Upon an examination it was discovered that the liabilities of the firm greatly exceeded their assets, and as the joint debts were entitled to a preference, it became manifest that the interest of

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Myrick, which was merely a share in the surplus after paying all the firm debts, would not sell for anything. Pettingill thereupon abandoned his levy. Upon this state of facts, Moss filed his bill for a perpetual injunction against the judgment of Pettingill being executed upon his property, claiming that the levy upon the property of his principal, and its abandonment, worked his discharge. He insisted that the levy should have been exhausted by a sale of Myrick's interest; but we held that the party might abandon the levy, and hold himself ready to show that the interest would not have sold for anything. On *page* 222, the Court says, "It is urged that the Defendant Pettingill had no right to relinquish his levy, but was obliged to pursue it to a legal and actual demonstration, that the property levied upon would all be consumed by the partnership liabilities. We think, however, that when he made his levy, and discovered that the extent of the firm liabilities was so great as to preclude the possibility of anything remaining to apply on his execution, he adopted the best course in abandoning it, taking upon himself the responsibility of establishing the facts, if any surety or party standing in that relation should question the propriety of the release."

Now if, as the Plaintiffs insist in this case, the assets of the firm would not have paid off the firm liabilities, it would have been a useless expense and delay to have called for an accounting with Rehfeld, and demonstrated by judicial decision the insolvency of the firm, in order to gain a status in court upon the original demand, upon the theory of having exhausted the security. We think the Plaintiff is not driven to such a course by the Statute of 1860, but he may bring his action on the original claim, in the first instance, holding himself ready to prove that, *in fact*, he had no security. This issue is made in the pleadings in this case, and we think the Defendants have a right to try it. The affirmative is with the Plaintiffs; they admit taking the assignment of the Defendant's interest in the partnership assets. That admission puts them out of court until they either show that it was exhausted before bringing the suit, or that it was valueless. They have chosen the latter and must prove it.

There must be a trial of this issue. Judgment reversed and new trial awarded.

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GEORGE W. LAY *et als.*, Appellants, *vs.* JOHN I. SHAUBHUT and HENRY SHAUBHUT, Respondents.

APPEAL FROM THE DISTRICT COURT OF BLUE EARTH COUNTY.

A Sheriff having attached certain real property of the judgment debtor, proceeds to sell on execution, but advertises and sells under an erroneous description, intending however to sell the property attached. The judgment creditor purchases at the sale, in the belief that he is purchasing the property attached, and wholly ignorant of the error in the description. It afterwards appears that the judgment debtor has no manner of title or claim to the property as described in the advertisement and certificate of sale. *Held*, that a Court of Equity will relieve from the mistake.

Points and Authorities for Appellants.

I.—The judgment was satisfied in fact by sale upon execution, and was satisfied in the Docket by return of execution "satisfied."

There could be no mistake for the same premises advertised were sold, and the same levied upon was advertised as set forth in the complaint. And the Sheriff could not be mistaken as to the levy, for he was required to go upon the premises to make the levy. *Pub. Stat.*, *p.* 368, *sec.* 88, *p.* 357, *sec.* 148; *Vol.* 1 *Min. R.*, *p.* 429.

II.—At a Sheriff's Sale of real estate, only the right, title and interest of the Defendant in the execution is sold, and the notice of sale only advertised that title.

III.—The notice of sale did not purport to advertise any premises previously attached, but certain premises levied upon by virtue of the execution; no attachment was referred to in the notice of sale.

IV.—The purchasers bid upon the lots advertised in the notice of sale. Town plats being public records are constructive notice to all parties, and it is immaterial to the purchaser as to the intent of the Sheriff to levy upon other premises.

V.—The Plaintiffs do not present a case wherein the Court

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are called upon to grant any relief. *Vol.* 1 *Story's Eq., sec.* 141 and cases cited.

If a judgment was satisfied of record through mistake, and the parties should apply to have the satisfaction set aside, the Courts would not grant him his prayer if it should appear that the judgment was satisfied in fact.

VI.—In this case a bid was made upon property consisting of several lots. Nothing is alleged or proven to show that any particular lots included in the sale was the inducement of the purchase; the purchasers, according to their own showing, got all that they expected in two of these lots, and these, in the absence of any allegations or proofs to the contrary must be presumed to be worth the whole amount of the bid and the Court will not set the sale aside.

VII.—There was also another bid made at the sale of $500, and it will not do for the Court to presume that such bidder was also mistaken.

VIII.—It is quite probable that a loss will be sustained if the sale is set aside and the property again sold; the reputation of the property is embarrassed and injured by the previous sale, which would prejudice the sale, and it would be hardly expected that it would again sell for as much as it would have sold for at the previous sale. The Court can do no more for the Plaintiff in ordering a new sale than to condition it upon the bidding by Plaintiffs upon lots one and five in block three, a sum equal to five hundred dollars, if a loss must be sustained. Even if through mistake, it is but right that the party committing the mistake should be the loser. For he that asks equity must do equity. *Willard's Eq. Jur.*, 646.

IX.—If the Plaintiffs purchased through mistake as to the lots, it is a mistake through their own carelessness, for by examination of the title they could easily have ascertained their condition; they were the Plaintiffs in the execution and are responsible for the regularity of the proceedings. *Willard's Eq. Jur., p.* 70; *Taylor vs. Fleet*, 4 *Barb.*, 95.

X.—It would work a great hardship to subsequent judgment creditors was the sale set aside and a new execution ordered. Sales have already been made since the satisfaction

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of the judgment, upon other judgments, the subsequent creditors have acquired rights and the Courts will not interfere to set the sale aside. *Vanderburgh vs. Briggs*, 7 *Cow., p.* 366.

Points and Authorities for Respondent.

I.—On a sale of personal property to which the Defendant in the execution had no title, the Court ordered the endorsement struck out and gave leave to issue a *fi. fa.* for the whole amount of the judgment. 5 *Cow.*, 280, *Adams vs. Smith & Parmelee.* To the same effect see 7 *Pick.*, 52, *Flagg vs. Dryden*; 2 *Wend.*, 260, *Ontario Bank vs. Lansing*; 12 *Wend.*, 253, *Meeker vs. Allen.*

II.—In this instance the Respondents are the senior attaching creditors of Lay, and the Appellants are all junior attaching or judgment creditors. Moreover the judgment setting aside this sale is conditioned that certain sales heretofore made by the Appellants shall remain undisturbed.

Where the Defendant had no title to land sold on execution, and the Sheriff had given a certificate of sale to the purchaser, and endorsed the bid on the execution, relief was denied on motion and the purchaser sent to a Court of Equity. The Court however say, "clearly there must be a remedy in such a case." 5 *Cow.*, 58, *Lansing et als., Executors, vs. Quackenbush.*

III.—This is an action in Equity and not a motion.

The Deputy Sheriff applied to set aside a sale where there was a misdescription of the premises and also a mistake as to the place of sale, which was granted. 4 *Cow*, 415, *Wright & Ely vs. Hooker*; 1 *How. Prac. Rep.*, 112, *Tinker & Craft vs. Irvine.*

IV.—The Appellants insist it was error for the Sheriff to sell all the lots in one bid. We claim this was only an additional reason why the sale should be set aside.

V.—No proof was made by either party showing the value of the two lots correctly described in the notice of sale.

VI.—All the creditors can bid at the next sale, or redeem, and by either mode get the benefit of the full value of the property.

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VII.—The Respondents never made a legal purchase of these lots, as they bid under a mistake; and neither law nor equity will enforce a contract against the consent of a party, he has never made, even though it is beneficial to him.

VIII.—The complaint distinctly alleges that the Defendant Lay owned the eight lots in block six of Everett's survey, where they were attached and where one judgment was docketed; but that he did not then nor at any time own the eight lots of block six of Bruner's survey described in the notice of sale, neither of which allegations are denied in the answer of these Appellants.

IX.—The only allegation of the complaint which is denied by these Appellants (aside from the denial of facts subsequently admitted by them in their stipulation,) is their denial of a mistake of description in the notice and sale of the eight lots. Hence if any error has been made in the introduction of evidence, upon any other point on the trial below, they cannot take advantage of it here. All the evidence on the other points was necessary only by the answer of Hilton and wife, who specially denied every allegation of the complaint. But Hilton and wife are not Appellants here.

The levy may have been made by entry upon the true property, and the description be wrong. That would be mistake. If the entry for the purpose of the levy was upon the wrong property, that was mistake. And if the levy was made without entry, it was void, and the satisfaction should be annulled.

WILKINSON & BARNEY, Counsel for Appellants.

WAITE & BURT and A. G. CHATFIELD, Counsel for Resp'ts.

By the Court—EMMETT, C. J.—The general rule that an act done or contract made under a mistake, or ignorance of a material fact, is relievable in equity, is peculiarly applicable to this case.

The Plaintiffs, having previously commenced an action for the recovery of money against George W. Lay, one of the Defendants in this action, had attached as security for the

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satisfaction of such judgment as they might recover therein, certain real estate belonging to said Lay, amongst which were ten lots in the town of Mankato. The lien thus acquired proved to be prior to the liens or interest acquired by any of the Defendants in the present action. After the Plaintiffs had recovered judgment against Lay, in the action in which said property had been attached, execution was issued thereon and delivered to the Sheriff of Blue Earth county, who was the same who had attached the property at the instance of the Plaintiffs. Upon the receipt of this writ it became the duty of said Sheriff to satisfy the judgment out of the property attached by him, if it were sufficient for that purpose. *Comp. Stat.*, 552, *sec.* 156. He accordingly advertised for sale under said execution ten lots in the town of Mankato, as the property of said Lay, supposing at the time that he was advertising, and intending thereby to advertise the same ten lots, which he had previously attached. But in describing the same, he committed an error, in regard to the particular plot or survey by which eight of the lots were numbered, they being numbered in the return to the attachment according to Everett's survey, whereas he described them in the notice of sale as numbered according to the survey of Bruner. On the day appointed for the sale, the Sheriff still being ignorant of any error in the description, and intending to sell the same lots which he had attached, as before mentioned, sold, according to the erroneous description, all of the lots as one parcel to the Plaintiffs for a sum sufficient to satisfy their judgment and costs, and returned the execution as "satisfied in full." At the time of the sale the Plaintiffs also were ignorant of any mistake in the description, and bid upon the lots and purchased the same, supposing that they were purchasing, and intending only to purchase the lots which had been attached at their instance to secure such judgment as they might recover against Lay. The ten lots attached belonged to Lay, but according to the description contained in the notice of sale he had no manner of title or claim to eight of the lots actually sold.

The error in the description appears not to have been discovered until after the Plaintiffs' judgment had been entered

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satisfied of record, and until after other, but subsequent judgment creditors, relying upon the payment of the Plaintiffs' prior lien, had sold certain other real estate of said Lay to satisfy their claims. The Plaintiffs then brought their action for relief, setting forth the mistake of fact under which they purchased, and alleging the insolvency of Lay.

The Court found the facts substantially as above stated, and granted the relief prayed for, but without prejudice to sales made on other judgments, on the faith of the Plaintiffs' judgment being satisfied.

We think that the Plaintiffs were entitled to the relief granted. They purchased the property under a mistake of a fact, which was material to their contract, and the main efficient cause of their purchase. They had the first lien upon the property attached, and ought not to be deprived of it without payment, unless it becomes necessary for the protection of parties having equal or superior equities. To restore the Plaintiffs to their rights does not prejudice junior judgment creditors, for the liens of the latter were, from the first, subject to the Plaintiffs' lien. They are not therefore considered merely in the light of creditors deprived by the judgment of the Court below, of any right to which they had entitled themselves,—they are merely prevented taking advantage of a mistake for which perhaps the Sheriff alone is responsible; for as it was the duty of the Sheriff to satisfy the judgment out of the property attached, the Plaintiffs might reasonably believe that he would not, in the first instance, attempt to sell any other. The decree simply restores the parties to the same condition in which they were prior to the sale, at the same time protecting all who have acquired rights by purchases made on the faith of the Plaintiffs' judgment being satisfied of record. This, it appears to us, protects all who have shown themselves entitled to protection; and as to the others, as they are in the same condition that they would have been in had no sale taken place, they can lose nothing and ought not to expect that a Court, in the exercise of its chancery powers, would inflict a loss upon the Plaintiffs for their especial benefit.

Judgment affirmed.

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JOHN O'CONNELL, Plaintiff in Error, *vs.* STATE OF MINNESOTA, Defendant in Error.

ERROR TO THE DISTRICT COURT OF WRIGHT COUNTY.

An indictment for rape charging that A. B. on &c., "in the county of Wright, did feloniously ravish and forcibly and against her will carnally know one C. D., a woman of the age of ten years and upwards, against the peace and dignity of the State," is sufficient.

It is not necessary to allege the crime to have been committed at any particular place within the county named, nor that the words "forcibly and against her will" should follow the word ravish; the latter is the essential word, and imports not only force and violence on the part of the man, but resistance on the part of the woman—nor is it essential to charge an assault in terms. The statute authorizes the jury to convict for an assault with intent to commit a rape, on the trial of such an indictment, and, upon such conviction, the punishment is prescribed by *Section 40 of Chapter 89, Comp. Stat.*, 706.

An indictment for rape should not conclude *contra formam statuti.*

The following is a copy of the indictment in this case:

"John O'Connell is accused by the Grand Jury of the county of Wright, by their indictment, of the crime of rape, committed as follows:

"The said John O'Connell, on the seventeenth day of February, A. D. 1861, in the county of Wright, did feloniously ravish and forcibly and against her will carnally know one Barbara Oehrlein, a woman of the age of ten years or upward, against the peace and dignity of the State of Minnesota."

The Jury rendered the following verdict:

"The Jury find the Defendant John O'Connell not guilty of the rape, but guilty of an assault with an attempt to commit rape."

The prisoner was sentenced as follows:

"The judgment of the law is that you, John O'Connell, be punished by confinement to hard labor in the State Prison at Stillwater for the term of ten years, the first twenty days of which term shall be passed in solitary confinement."

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Points and Authorities of Plaintiff in Error.

A writ of error lies to correct error in the record not amendable or cured by verdict. *Bouv. L. Dict.*, *Vol.* 2; *Title Writ of Error*, 3; *People vs. Stockham*, 1 *Park. Criminal Reports*, 424.

Error in substance in an indictment can only be amended by the Grand Jury and is not cured by verdict. *State vs. Armstrong*, 4 *Minn.*, 339, 340; *State vs. Hinkley*, 4 *Min.*, 362, 363.

Judgment below should be reversed, because,—

1st. The indictment fails to state facts sufficient to constitute rape or assault with intent to commit rape, and hence cannot support the conviction and sentence herein. *Wharton Am. Cr. Law*, 4*th Ed.*, *sec.* 285 *and note.*

a. The indictment must contain "a statement of the acts constituting the offence in ordinary and concise language." *Comp. Stat.*, *p.* 755, *sec.* 66, as commented on in 4*th Minn.*, 357, 358.

b. It must be direct and certain as to "the particular circumstances of the offence charged when necessary to constitute a complete offence." *Comp. Stat.*, *p.* 759, *secs.* 69, 3.

c. The "Acts constituting rape and the particular circumstances of that offence" are,—

1st. An assault upon the injured party by the Defendant.

2d. A forcible ravishment against the will of the female.

3d. Carnal knowledge of her had by force and against her will.

d. The approved common law form is in *Archibald*—"that A. B. on the —— day of ——, at —— in said county, did violently and feloniously make an assault upon the body of ——, and her the said A. B. then and there violently and against her will did ravish and carnally know against the form of the statute, &c."

e. An indictment for rape cannot be drawn here as at common law, though the indictment in this case fails, both at common law and under the statute. *Abstract folios*, 192.

f. Rape at common law is the unlawful carnal knowledge

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of a woman where she does not consent. *Statute Westminster*, 2, *chap.* 34; 3 *Greenl. on Ev., p.* 208, *note* 2, 3*d Ed.*

g. By our statute it is the forcible ravishment and carnal knowledge of a woman over the age of ten years against her will. *Comp. Stat., p.* 706, *sec.* 39, *p.* 757, *form No.* 11.

h. Under our statute the present indictment fails in not stating the acts necessarily making up the crime of rape.

I.—It alleges no assault upon the injured party, without which no ravishment can be felonious or even exist. See *Abstract*, *folio* 1.

a. To convict of rape or assault with intent to commit it, it must appear that the female resisted as far as she could. *People vs. Morrison*, 1 *Park. Crim. R.*, 644; *Comp. Stat., p.* 784, *sec.* 255, *p.* 783, *sec.* 254.

II.—The indictment simply says "feloniously" ravished, which is not equivalent to nor synonymous with "by force and against her will." *Comp. Stat., p.* 706, *sec.* 39.

a. Where the statute defines an offence and the "acts constituting it," and states the elements composing it, no other than the statute or synonymous words will answer in the indictment. *Wharton's Am. Cr. Law*, 4*th Ed., sec.* 364 *to* 367, and cases cited; *Peek vs. State*, 2 *Humph.*, 78; *State vs. Stedman*, 7 *Porter*, 495; *Ike vs. State*, 23 *Miss.*, 525; *Ewbanks vs. State*, 17 *Ala.*, 181; *State vs. Eldridge*, 7 *Eng.*, 608.

b. "Feloniously" under our statute does not even mean with intent to commit felony, but "criminally," and would equally well apply to misdemeanors as to crimes, as "crimes" embrace both. *Comp. Stat., p.* 736, *sec.* 18; *Id., p.* 700, *sec.* 2.

c. "Feloniously ravished" might suffice at common law, but not under our statute, and the definition of rape under our law. *Comp. Stat., p.* 706, *sec.* 39; *Id., p.* 757, *form No.* 11.

d. The words "forcibly and against her will," the gist of the crime, are not spoken of the ravishment, but only of the carnal knowledge, and the indictment therein is fatally defective. *Comp. Stat., p.* 706, *sec.* 39; 1 *Russell on Crimes*, 561; *State vs. Jim*, 1 *Dev.*, 142.

e. "An indictment for intent to commit rape containing no allegation of force is defective and furnishes no basis for a

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judgment." *State vs. Blake*, 39 *Maine*, 322, and cases there cited.

The Maine statute as to rape is the same as ours, and the indictment in the above case used the word "violently" as in the common law form.

III.—"No place within the jurisdiction of the Court" (*is* the county,) is stated where the offence was committed. Not only the county but town or other place should appear. *Comp. Stat.*, *page* 760, *secs.* 76, 4; *Com. vs. Springfield*, 7 *Mass.*, 9; 7 *Mass.*, 13; 2 *Hawk.*, *chap.* 22, *sec.* 92; *Ibid.*, *chap.* 23, *sec.* 92; 6 *Co.*, 14 *Murphey*, 30; *State vs. Roberts*, 24 *Maine*, 374.

IV.—The indictment does not conclude against the form of the statute, though rape is a statutory crime. *Wharton's Am. Crim. Law*, *sec.* 411, *4th Ed.*, and cases cited; *State vs. Dick*, 2 *Murph.*, 388; *People vs. Enoch*, 13 *Wend.*, 159, 175; 7 *Mass.*, 9, 11; 2 *Ib*, 116; 11 *Ib*, 279, *c*, and if not so concluding is defective. *Hardin*, 95; 11 *Mass.*, 279; *Francisco vs. State*, 1 *Carter*, 179; *State vs. Pool*, 2 *Dev.*, 202; *Fuller vs. State*, 1 *Blackf.*, 163.

V.—The sentence herein is excessive. *Comp. Stat.*, *p.* 706, *sec.* 41, (as to the punishment,) is repealed by *Comp. Stat*, *p.* 707, *sec.* 45, which is last in numerical order. *Comp. Stat.*, *p.* 117, *sec.* 13.

To construe *sec.* 45, *p.* 707, *Comp. Stat.*, so that the words "the punishment of which assault, &c.," should apply to the words burglary, rape, &c., is absurd, because,—

a. There can be but one kind of assault with intent to commit rape, and it would be nonsense to include rape, burglary, &c., if the qualifying words apply to them.

b. The qualifying words evidently apply to the words "or any felony," also the enumeration of assaults theretofore punishable would be useless, and the statute must receive such a construction as to give it effect.

c. The obvious meaning of the statute is that attempts to commit the felonies there enumerated, and all felonious assaults not specifically punishable before, should be within its operation.

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Points and Authorities of Defendant in Error.

I.—No bill of exceptions accompanies the record in this case, nor does it appear that any exception was taken to the indictment in the Court below.

This Court will not entertain questions which have not received the actual decision of the tribunal from which they came, unless it is evident that substantial error has been committed, and adequate relief cannot be had from the Court below. 3 *Min.*, 141; 4 *ib.*, 169.

II.—The statute creates no new offence, but simply defines the crime as it existed at common law.

The gist of the crime is the unlawful and carnal knowledge of the woman by force and against her will.

The word ravish imports force in the man, and want of consent in the woman; the addition of these words would have been simple tautology, and is neither required by the statute or common law. *Harman vs. Commonwealth*, 12 *Sergt. and Rawle*, 69; *Bouvier's Law Dict.*, 409; 1 *Russ. on Cr.*, 674 *and* 686; *sec.* 39, *p.* 706, *Com. Stat.*

III.—Rape was a felony at common law, and the conclusion, "*contra formam statuti*," is unnecessary. 1 *Russ. on Cr.*, 686.

IV.—The objections to the conclusion of the indictment, and that no place within the jurisdiction of the Court is stated, should have been taken by demurrer, and are not open to the Defendant here. *Sec.* 126, *p.* 766, *Comp. Stat.*

V.—The sentence within the limits prescribed by law was within the discretion of the Court below. *Sec.* 41, *page* 706, *Comp. Stat.*

The evidence is not before this Court, but it is to be presumed that the facts proved warranted the sentence.

Edward Hartley, Counsel for Plaintiff in Error.

Gordon E. Cole, Attorney General.

By the Court—Emmett, C. J.—The indictment in this case charges that the Defendant on, &c., "in this county of Wright

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did feloniously ravish and forcibly and against her will carnally know one Barbara Oehrlein, a woman of the age of ten years and upwards, against the peace and dignity of the State of Minnesota."

On the trial the jury found the Defendant "not guilty of the rape, but guilty of an assault with intent to commit a rape," and the Court thereupon sentenced him to ten years imprisonment in the penitentiary.

The Defendant claims that this indictment is insufficient in this, that it does not charge an assault, without which he could not be convicted of the offence of which he was found guilty, in that it does not charge that he ravished "forcibly and against the will" of said Barbara; in that it does not allege the crime to have been committed at any place within the jurisdiction of the Court, and because it does not conclude "against the form of the statute." He also insists that the sentence is for a term not warranted by the statute, which prescribes the punishment for the offence of which he was convicted.

The statute upon which the indictment was founded is as follows:

"If any person shall ravish and carnally know any female of the age of ten years or more, by force and against her will, he shall be punished by imprisonment in the Territorial [State] prison not more than thirty years nor less than ten years; but if the female on trial shall be proven to have been at the time of the offence a common prostitute, he may be imprisoned not more than one year." *Comp. Stat.*, 706, *sec.* 38.

The form of indictment for rape, suggested by the statute, states the charge thus:

"Forcibly ravished C D, a woman of the age of ten years and upwards." And the statute further provides that it shall be sufficient to follow substantially the forms prescribed.

It is observable that this form omits the assault; and notwithstanding the statute prescribing the punishment uses the word, "and carnally know by force and against her will," these words also are omitted. The reason these words, or their equivalents were not deemed essential, was because they are all included or embraced in the word "ravish" or rav-

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ished, which is the essential word in all indictments for rape. It imports not only force and violence on the part of the man, but resistance on the part of the woman. When therefore it is charged that A. B. feloniously ravished C. D., it is but a repetition to add that he carnally knew her forcibly and against her will.

The form of the indictment at common law charged that the Defendant therein, "in and upon one C. D. feloniously and violently did make an assault, and her, the said C. D., then violently and against her will feloniously did ravish and carnally know." But even at common law, where the greatest particularity was required, it was long since held that an indictment omitting the assault was not defective; and that the words "feloniously did ravish" were sufficient without the words "carnally know," and "forcibly and against her will."

We think that so far as this objection is concerned, this indictment is not only good under the statute, as substantially following the form prescribed, but that it would have been sufficient at common law also. It is far stronger than the statutory form, because it charges the act to have been done "feloniously," while the form uses the word "forcibly" instead. The former includes the latter, and is a much more appropriate term, but as the statutory form does not make use of it, it cannot be deemed essential.

As to the objection that no place is named within the jurisdiction of the Court where the crime was committed, we think the allegation that the acts were done in the county, is all that is necessary. It is not necessary to state the particular place within the county.

The crime of rape is a crime at common law, and the indictment therefore need not conclude *contra formam statuti.* The statute does not define the crime, but prescribes the punishment.

The right of the jury to convict of an assault with intent to commit a rape, although the indictment is for a rape only, is clearly given by the Statute, (*Comp. Stat.*, 783, *sec.* 20,) which provides that "upon an indictment for any offence the jury may find the Defendant not guilty of the commission thereof, and guilty of an attempt to commit the same." It is

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however contended that the sentence in this case exceeds the term of punishment which the law prescribes for the offence of which the defendant was convicted.

The punishment for assaulting a female with intent to commit the crime of rape, as prescribed by *sec.* 40 *on page* 706 *of the Comp. Stat.*, is imprisonment in the penitentiary for a term not more than ten years nor less than one year. But as *section* 44 of the same chapter provides that "if any person shall assault another with intent to commit any burglary, robbery, rape, * * * or other felony, the punishment of which assault is not herein [in this chapter] prescribed, [he] shall be punished by imprisonment, &c., not more than three years nor less than six months, or by fine, &c.," the Defendant insists that the punishment prescribed by said *section* 44 must govern, because it is the last in numerical order, according to the rule of construction laid down by the statute. *Comp. Stat.*, 117, *sec.* 20.

The rule to which we are thus referred expressly provides, however, that it need not be followed if such construction be inconsistent with the meaning of the chapter. And we think it would be entirely inconsistent with the meaning of the chapter in which the sections above recited occur, to hold that a section which is expressly directed to the punishment of a particular offence, should be rendered null by a mere implication, because a subsequent section, which is general in its character and intended to cover or provide against omissions, happens to mention the same offence in general terms. Besides, this subsequent section expressly excepts those assaults, the punishment for which has been therein [in said chapter] prescribed; and we have seen that *section* 40 prescribes the punishment for an assault with intent to commit a rape. We hold that the section which refers alone to the punishment of this particular crime is the one that should govern, and as the sentence is within the limits of the discretion therein given to the Court, it is not excessive or unauthorized.

We have been unable to discover error in this record, and we must accordingly affirm the judgment of the District Court.

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D. W. C. DUNWELL, *et als.*, Appellants, *vs.* JOHN B. WARDEN, *et al.*, Respondents.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

Upon a judgment by default, the affidavit showing that no answer had been received appeared to have been sworn to before service of the summons. *Held*, that the Court had power to amend the record by inserting the true date when the affidavit was sworn to, if the facts showed that the date named in the jurat was an error.

Several days after the hearing of a motion to amend, the moving party served additional affidavits on Defendants' Attorney, with a notice that the same would be submitted to the Judge to be read and used upon the motion; and the same were received and considered by the Court in determining the motion. *Held*, that this was erroneous, and that additional affidavits could only be received by first obtaining leave of the Court, or upon regular notice of motion, giving the opposite party opportunity to be heard thereon.

Points and Authorities of Appellants.

I.—The entry of judgment was wholly unauthorized and void; because there was no proof filed with the clerk that no answer had been received within twenty days after the service of the summons. *Comp. Stat.*, 555. The affidavit filed purported to have been sworn to on the same day as the complaint, and before the summons was served.

II.—The Court has no authority to order its clerk to make erasures or interlineations in such official statements of independent officers as may be on its files.

III.—No amendment can operate *ex-post facto* to make a void judgment good.

IV.—There is no law requiring service of the answer on Plaintiffs' attorneys at their office. It is enough if it be received at some other place; and the affidavit does not state that one has not been thus received in due time.

Points and Authorities of Respondents.

I.—There was sufficient evidence before the clerk to authorize him to enter the judgment. The fact that the affida-

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vit purported to be dated prior to the service of the summons, and the party making it in good faith, making oath that "more than twenty days had elapsed since the service of the summons in said action upon said Defendants and each of them, and that no answer or demurrer to the complaint therein, or copy thereof had been served upon or received by the Plaintiffs' attorneys, nor left at their office in the City of Saint Paul, &c," was conclusive evidence to the clerk that the magistrate before whom the affidavit was made had made a clerical error in the date of the affidavit; and that the date of the affidavit was a clerical error, was made the more apparent by its being upon the same sheet of paper as the affidavit of disbursements, which bore date on the day of the filing of the paper in Court, which was on the twenty-first day after the service of the summons.

If the Court below erred at all it was in ordering a modification of the judgment, and we claim that the order of the Court below should be reversed, so far as it relates to such modification.

II.—The Court may at any time in its discretion correct any mistake or supply an omission in the pleadings and papers of a cause, or in its own proceedings. *Comp. Stat., page* 544, *sec.* 94.

And the Court must disregard any error or defect in the proceedings of a cause which does not affect the substantial rights of the adverse party, and no judgment can be reversed or affected by reason of such error or defect. *Comp. Stat., p.* 544, *sec.* 96. And this without the aid of the Statute. 4 *Wend.*, 623, *Wilson vs. Gale*; 4 *Taun. Rep.*, 749; 11 *Moore*, 104; 7 *B. & C.*, 819; 3 *Bing.*, 334; 1 *Cains*, 9; 3 *How. Pr. Rep.*, 213, *Wight & Wight, vs. Alden & Agan.*

III.—The error being clearly clerical as shown by the affidavits of counsel, the party who wrote the affidavit upon which judgment was entered, and the magistrate before whom it was taken, (see *folio, p.* 37 *to* 52 *inclusive, of case,*) the parties can be no more prejudiced by it, than if the same error had been made by the clerk. It is not the date of the affidavit that fixes the right of the clerk to enter judgment, but the fact that the party had been summoned into Court

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and had neglected and failed to appear and answer within twenty days after service. *Kipp vs. Fullerton*, 4 *Min.*, 473; *Graham's Practice*, 2d *Ed.*, *Ch.* 23, *p.* 649 *to* 670 *inclusive.*

MASTERSON & SIMONS, Counsel for Appellants.

SANBORN & LUND, Counsel for Respondents.

By the Court—ATWATER, J.—The Plaintiffs took judgment by default against the Defendants November 5th, 1858. The summons and complaint were dated, (as appears from the paper book,) October 4th, and the complaint sworn to on the 5th of the same month. It further appears that the summons was served upon the Defendants upon the 8th and 15th of October, 1858.

On the 25th of April, 1861, an order was obtained on behalf of the Defendants, that the Plaintiffs show cause before the Hon. E. C. Palmer on the 27th of the same month, why the judgment and all subsequent proceedings should not be set aside and vacated. This order was based upon an affidavit, showing that there was no proof that no answer had been received, except an affidavit of Theodore French, one of Plaintiffs' attorneys, which appeared by the jurat to have been sworn to on the 5th day of October, 1858, some days before the summons was served.

After argument upon this order, leave was granted the Plaintiffs to move for an order amending the record, and the motion to vacate was held open until the 11th day of May, when the motion to amend was heard and submitted. This motion was made upon the affidavit of Charles C. Lund.

On the 30th day of May the attorneys for the Plaintiffs served on the attorneys for the Defendants two other affidavits, one by Philip A. Roche and the other by J. Mainzer, accompanied by a notice that "the affidavits hereto attached and served upon you, will be handed and submitted to the Hon E. C. Palmer, Judge of the above named Court, to be read and used upon the motion made by and on behalf of said Plaintiffs on the 11th day of May, 1861, at a special

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term of said Court for an order amending the record in this cause."

On the 8th of June an order was made and filed denying the motion to vacate, and granting that to amend the record. From this order Defendants appeal.

The entry of judgment was clearly irregular, as the affidavit on which it was based was defective and did not show that no answer had been received within the time required by statute. But it was not necessarily void, and if in fact it was properly entered, we think it was competent for the Plaintiffs to show the fact; and that consequently the Court was right in entertaining the application for leave to amend, and in withholding its decision on the order to show cause until after the hearing of that application. *Section* 94, *page* 544, *Compiled Statutes*, confers upon the Court full power to correct mistakes of this nature, when it can be done in furtherance of justice. In this case there is no complaint on the part of the Defendants against the judgment on its merits, but only as to the regularity of its entry. While the Defendants are entitled to urge this objection the Plaintiffs have also the right to meet it, by showing that in fact the requisitions of the statute have been complied with; and the Court has the power to make the record correspond to the facts, when by so doing the ends of justice will be furthered.

But the submission of the additional affidavits of Roche and Mainzer by the Plaintiffs, on the 30th of May, after the hearing of the application to amend, and without leave of the Court, or opportunity to the Defendants to be heard thereon, was clearly irregular and unauthorized. These affidavits had an important bearing on the case, perhaps even more so than that of Mr. Lund, read at the hearing of the motion. They state facts showing that the word "October" in the jurat should have been "November," and from the opinion of His Honor, Judge Palmer, on file, it is manifest these affidavits were considered by him, and that his decision was based in part at least upon them. When a motion is made the opposing party has the right to know what affidavits and other papers and evidence will be used in support of it, that he may prepare to meet them by counter proof; and he

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has also the right to be heard in argument upon the whole proofs when submitted. To allow supplemental proofs to be introduced as these were, would deprive him of both these privileges. The proper way to adduce additional evidence after the submission of a motion to the Court, is to apply for leave, which being granted, the additional papers should be served upon the opposite party, with notice that they will be presented to the Court at a time and place mentioned. Or otherwise, by regular notice and service of papers, as on an original motion. The adverse party will then be allowed the same opportunity to oppose them, that he enjoyed upon the first hearing in regard to the proof then introduced.

The affidavit of Mr. Lun l may have been sufficient to satisfy the Court that the error in the record was a mere clerical one, but we cannot so determine. The Court considered the incompetent proof, and as it was of an important nature, we cannot say it was not influenced thereby. The order should therefore be reversed, but without prejudice to either party, or both, to renew their motions.

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WILLIAM C. THOMPSON *et als.*, Appellants, *vs.* CALEB MORGAN, Respondent.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

A mortgage executed in the presence of only one witness is ineffectual to pass any interest or estate in the lands described, and is not entitled to record. The record of such a mortgage is no notice to any one.

The recital of such a defective mortgage in a deed of the same lands by the mortgagor, merely describing the mortgage and declaring the deed to be subject to it, does not estop the grantee in the conveyance, or those holding under him, from questioning the validity of the mortgage.

The certificate of acknowledgment to a deed or mortgage need not be under seal, unless the statute authorizing the officer to take it expressly requires it. If the certificate styles the officer taking it as an officer authorized by law to perform the act, it will be *prima facie* evidence of his official character. The Statutes of this State in force in 1854, did not require a seal to such certificates.

The act of the Legislature of July 26, 1858, (*Comp. Stat.* 403-4,) does not affect any rights that were vested prior to its passage. The Legislature may perhaps have power to cure irregularities in conveyances, between the parties to them and all persons who take subsequent to the cure being wrought, but it cannot disturb vested rights.

Points and Authorities for Appellants.

I.—The mortgage relied on bearing date 22d October, 1854, which was Sunday, and the acknowledgements of the Notary being of the same date, without his seal of office and attested by but one witness, was not entitled to record, and therefore no notice. *Secs.* 8, 23, 24, *chap.* 35, *Comp. Stats.*, 398, 400; *Sigourney vs. Samuel*, 10 *Pick.*, 72; *Kerns vs. Swope*, 2 *Watts*, 75; 44 *Maine*, 25; 5 *Blackf.*, 92.

II.—The decree is erroneous in providing that a deed be executed to the purchaser upon sale of the premises and in not providing that such sale shall be made subject to redemption according to law, and in not specifying in said decree the right of possession of the said Appellant and his right and term of redemption, and is otherwise erroneous and contrary to law.

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Points and authorities for Respondents.

I.—The Respondent's mortgage, even if defectively executed, is an equitable mortgage or lien, and a Court of Equity will enforce it, according to the justice of the case. *Russell vs. Russell*, 1 *Leading Cases in Equity*, (*Hare & Wallace's notes*,) *p.* 519 *and cases there cited*; 1 *Hill. on Mort.*, *p.* 599, *chap.* 22.

II.—The Appellant Thompson is not a *bona fide* purchaser without notice as against the Respondent's mortgage. The Respondent's mortgage was properly reecorded; the statute authorizes the recording of a deed which has attached to it a proper certificate of acknowledgment, without reference to the number of witnesses to the deed. *Comp. Stat.*, *page* 400, *section* 23.

This mortgage has a proper certificate of acknowledgment attached—signed by an officer authorized by law to take it. The omission of his official seal is unimportant, as the statute in force at that time did not require that the seal be affixed. *Rev. Stat.*, *ch.* 4, *art.* 6, *p.* 43-4.

Besides, the Appellants' mortgage, the only foundation of his claim upon the premises, is acknowledged in the same manner, and the certificate is without seal, the same as ours. If the record of our mortgage is not valid, the Appellant's claim must also fall.

The deed from Folsom to Babcock (Appellant's grantor or mortgagor,) is upon its face made subject expressly to the Respondent's mortgage,—the mortgage being fully described and the record thereof referred to in the deed. It cannot be pretended that Babcock acquired an unincumbered title by that deed, and he could convey or mortgage only such title as he had; the record of Babcock's deed showed the incumbrance to which his title was subject, and was notice to all persons claiming under him, even if the mortgage had not been recorded at all.

There is no pretence in the Appellant's answer that he had not actual notice of the Respondent's mortgage, at the time of the execution of that under which he claims, and the Court will not presume that he had not such notice.

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III.—The deed from Folsom to Babcock properly executed, acknowledged and recorded, clearly describing the Respondent's mortgage, and made expressly subject to it, was not only a clear and explicit recognition of the existence and validity of the mortgage, but was an express ratification of it, as against all persons claiming under that deed; and this ratification was before the Appellant had acquired any interest in the property. "A party is estopped from denying a title which is recognized in a deed under which he claims." *Hart vs. Johnson*, 6 *Ham.*, 87; 2 *U. S. Dig., p.* 202, *sec.* 83, *S. C.*

IV.—The statute of July 26th, 1858, (*vide Comp. Stat., p.* 403, *sec.* 53,) cures the defective execution of Respondent's mortgage, and by force of that statute such mortgage stands with the same force and effect in all respects from its inception as if it had been originally executed in accordance with the statute then in existence. *Smith's Com's on Constitutional Construction, pp.* 409 *and* 410; *Watson vs. Bailey*, 1 *Binney*, 470; *Bammett vs. Bamett*, 15 *Serg. & Rawle*, 72; *Tate and wife vs. Stooltwoos et al.*, 16 *Ib.*, 35; *Satterlee vs. Matthewson*, 16 *Ib.*, 169; *Mercer vs. Watson*, 1 *Watts. Rep.*, 358; *Satterlee vs. Matthewson*, 2 *Peters*, 380, (8 *Curtis*, 147;) *Watson vs. Mercer*, 8 *Peters*, 88, (11 *Curtis*, 38;) *Chas. River Bridge vs. Warren Bridge*, 11 *Peters*, 420, (12 *Curtis*, 496); *Balt. & Susquehanna R. R. Co. vs. Nesbit*, 10 *Howard*, 395, (18 *Peters*, 428.)

V.—The fact that the Respondent's mortgage and the certificate of the acknowledgment thereof both bear date on Sunday, is unimportant—the referree having found that the mortgage was not in fact made nor acknowledged on that day.

VI.—The decree is proper in form except that the portion thereof in relation to the right of possession and redemption, under and pursuant to the statutes therein referred to should have been omitted, for—

1st. These statutes have no reference to and cannot affect mortgages executed prior to their passage. *Bronson vs. Kinsie*, 1 *How. U. S. Rep.*, 311, (14 *Curtis*, 628;) *McCracken vs. Haywood*, 2 *Ib.*, 608, (15 *Curtis*, 228;) *Gantley vs. Ewing*, *Ib.*, 716, (15 *Curtis*, 612;) *Howard vs. Bugbee*, 24 *Ib.*, 461.

2. These statutes do not purport to change the form or mode

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of proceeding on foreclosure in any case; but simply to qualify and abridge the estate acquired by the purchaser by virtue of the sale and conveyance by the (Sheriff or) referee. *Comp. Stat.*, *p* 672, *secs.* 14, 15; *Id.*, *p.* 481, *secs.* 19, 28; *Id.*, 646, *secs.* 21, 22; *Sess. Laws* 1860, *chap.* 87.

W. C. Thompson, Counsel for Appellant.

H. R. Bigelow, Counsel for Respondent.

By the Court—Flandrau, J.—The mortgage from Folsom and wife to Morgan executed on the 23d day of October, 1854, was ineffectual to pass any interest in the land described. It was executed in the presence of one witness only and was attested by only one witness. The statute requires that such instruments must be executed in the presence of two witnesses, who shall subscribe their names to the same as such. *Comp. Stats.*, 398, *sec.* 8. This point was discussed and decided in the case of *Parret vs. Shaubhut*, 5 *Minn. R.*, 323. We there held that a mortgage of lands with only one witness was not entitled to record, and passed no interest in the lands.

The objection that the certificate of acknowledgment was not under the seal of the officer making it, is untenable. We held in the case of *Baze vs. Arper*, decided at this term, that no seal is necessary to certificates of this character unless the statute authorizing them expressly requires it. 2 *Cowen & Hill.'s Notes to Phil. Ev.*, *p.* 462. If the certificate styles the officer taking it as an officer authorized by law to perform the act, it will be *prima facie* evidence of his official character. *Id.*, *pages* 461-2-3. The statutes of this State at the date of the execution of this mortgage required no seal. *Comp. Stats.*, 398, *sec.* 8.

Morgan took nothing by this mortgage. When Folsom and wife conveyed the premises to Babcock, April 21, 1856, the conveyance was made subject to the Morgan mortgage, which was so expressed in the deed. Babcock of course had notice that such a mortgage existed, but that did not change the character of the mortgage nor cure its defects. He could

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safely take the title subject to the mortgage and rely upon the defence that was patent upon its face for his protection. Babcock might perhaps have estopped himself from questioning the validity of this mortgage by any appropriate clause in his deed recognizing it as a subsisting lien, and waiving its defects, but the mere admission of notice that such a mortgage existed by a recital of it in this deed through which he derived his title would not operate such a consequence.

Thompson claiming under and through Babcock is affected by the recitals in the deed from Folsom to Babcock to the same extent that his grantor was, and no more. When Thompson took his mortgage from Babcock, he took with the same notice of the Morgan mortgage that was imputable to Babcock, to-wit, that such a defective mortgage existed, and he is in no way estopped from questioning it. *O'Daughaday vs. Paine*, decided this term.

The act of July 26, 1858, (*Comp. Stats.*, 403-4,) could not have the effect of curing the defects in the Morgan mortgage to the prejudice of Thompson's or Babcock's rights; it was passed subsequent to the date of the conveyances by which they acquired interests in the land. The Legislature have the right perhaps to cure such irregularities in conveyances as between the parties to them, and all persons who take subsequent to the cure being wrought, but it cannot disturb vested rights. We have been unable to find anything in the cases cited by the Respondent to this point that would induce us to admit this power in the Legislature.

The judgment is reversed, and the case remanded for judgment according to the principles here indicated.

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ROBERT WHITACRE, Respondent, *vs.* GEORGE CULVER, Appellant.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

C. gave his promissory note to F. F, after the note matured, and after it had been paid in full, transferred it, with other notes, to W. as collateral security for money borrowed, and then informed C. of what he had done, but desired him not to let W. know that the note had been paid, and he would take it up in a short time. W. afterwards notified C. that the note was in his possession, and that payment must be made to him alone. C. then stated to W. that a particular sum, or thereabouts, had been paid on the note, but did not inform him that it had been paid in full. W. kept the note in his possession for some two years or more. He then settled with F. for the loan, taking a new note for the balance still due, and retaining the same collaterals. He subsequently informed C. that he still had his note. *Held*, that, in an action by W. to recover on the note given by C., C. was not estopped from proving that it had been paid in full at the time it was transferred to the Plaintiff.

This action was tried bofore W. Wilkin, Esq., special referee, who reported in favor of the Plaintiff. The Defendant moved to set aside the report, and for a new trial, which motion was denied by the Court below. The Defendant appeals.

The facts found are fully stated in the opinion of the Court.

Points and Authorities of Appellant.

I.—The note of the Defendant being taken by the Plaintiff after due, was subject to the defence of the Defendant in his hands, which was fully made out. *Johnson vs. Bloodgood*, 2 *Caine's Cases*, 303; *Paine vs. Cutter*, 13 *Wend.*, 605; *Williams vs. Matthews*, 3 *Cow.*, 252; *Edwards on Bills*, 259–60; *Manhattan vs. Reynolds*, 2 *Hill.*, 140; *De Mott vs. Starkie*, 3 *Barb. Ch.*, 403.

II.—The admissions of the Defendant did not amount to an estoppel.

In that they were made after the Plaintiff's title had passed and the note was not taken on the faith of such admissions and the Plaintiff was not prejudiced thereby; and in that the Plaintiff's conduct is not shown to have been in any way influenced by them and they had no direct connection with the

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action of the Plaintiff; and in that they were indefinite and not inconsistent with his defence, and in other respects do not furnish the elements of an estoppel. *Dezell vs. Odell*, 3 *Hill.*, 222; 2 *Smith's Leading Cases, Am. Ed.*, 561–2–3–4, and authorities cited; *Reynolds vs. Lounsberry*, 6 *Hill*, 534; *Rogers vs. Farwell*, 9 *Barb.*, 615; *De Mott vs. Starkey*, 3 *Barb.*, 406; *Watkins vs. Peck*, 13 *N. H.*, 360; *Sargent vs. Sargent*, 18 *Vt.*, 371.

III.—The estoppel to be binding should be mutual. *Co. Litt.*, 352, *a*; *Lansing vs. Montgomery*, 2 *Johns*, 383.

IV.—A party relying upon an estoppel must plead it if he have opportunity, and if he pleads it must be confined to the estoppel he has pleaded. *Lansing vs. Montgomery*, 2 *Johns.*, 383; *Gould vs. Richardson*, 6 *Pick*, 364; *Sawyer vs. Hoyt*, 2 *Tyler*, 288; *Isaacs vs. Clark*, 12 *Vt.*, 692; *Woodhouse vs. Williams*, 3 *Dev.*, 508; *Davis vs. Thomas*, 5 *Leigh.*, 1; *Bunsmail vs. Mayo*, 9 *Vt.*, 31.

V.—The report of the referee was against the evidence as to the question of estoppel and the facts connected therewith, and the conclusions of law reported by him.

Points and Authorities of Respondent.

The question is, whether upon the facts the Defendant is liable to the Plaintiff upon this note as found by the referee. We confess we do not see any room for argument. The Defendant, at the request and to accommodate Fridley, represented to the Plaintiff that he was liable upon the note, with a full knowledge that he was not so liable, unless he chose to make himself so, and the Plaintiff, relying upon these representations, renewed his note against Fridley, extending the time of payment one year upon the strength of Defendant's note, which he was to retain as collateral security for the new note. Most certainly under these circumstances the Defendant is now estopped from denying his liability upon the note to the Plaintiff. Lord Denman's definition of an estoppel as laid down in the Dutchess of Kingston case, referred to and approved by this Court in *Caldwell vs. Auger & Herbert*, 4 *Minn. R.*, 217, is conclusive upon the subject.

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The referee finds as a fact that the Plaintiff frequently spoke to the Defendant about the matter, both before and after the settlement of October, 1857, when the old note was given up, and that the Defendant always left him in the belief that there was no defence to the note except the sum of $450. Also, that the Plaintiff was misled, and relying upon the misrepresentations was induced to make the settlement of October, 1857, by which the old note was given up and a new one taken, payable at a future time.

That Fridley became insolvent sometime in 1857. The settlement was made and new note given in October, 1857, which would probably be just about the time of Fridley's transition from solvency to insolvency. The matter stands thus. The Plaintiff having taken the Defendant's note as collateral, informed him of the fact, and frequently spoke to him about it, and the Defendant always gave him to understand it was all right. The Plaintiff relying upon the representations of Defendant as to his liability upon the note, makes a settlement with Fridley, whereby he gives up the original note and takes a new one payable at a future day, under an agreement that the Defendant's note should be held as collateral for the new note. The Defendant is again informed of this transaction, and again responds that it is all right. If this will not estop him from now denying his liability upon the note, there is no use for the law of estoppels.

Horn & Galusha, Counsel for Appellant.

Smith & Gilman, Counsel for Respondent.

By the Court—Emmett, C. J.—On the 26th of July, 1855, one Fridley borrowed money of the Plaintiff, and as collateral security for the payment of the loan, transferred to him the note on which this action is brought. At the time of the transfer the note was overdue, and had in fact been paid. Fridley afterwards informed the Defendant of the transaction, but desired that he would not inform the Plaintiff that there was nothing due on the note. Afterwards the Plaintiff notified the Defendant that said note was in his possession, and

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that all payments thereon must be made to him; and Defendant then stated "that $450 or thereabouts had been paid on the note," but said nothing about any other payments or offsets. The note remained with the Plaintiff until October, 1857, when he settled with Fridley for the money loaned, and took from him a new note for the balance found due, retaining by agreement the same collaterals. After this settlement the Plaintiff again notified the Defendant that he still held his note as collateral security, but Defendant did not then, nor did he ever, though having frequent conversations with him, both before and after this settlement, inform the Plaintiff or claim to him, that he had any defence or offset to the note, or that any portion thereof had been paid, except about four hundred and fifty dollars.

Fridley failed to repay the loan, and the Plaintiff brought this action, setting up the loan, the failure of Fridley to pay, the taking of the Defendant's note as collateral security, and the admission of the Defendant that it was wholly unpaid, except the sum of $450. The Defendant denies the admission and alleges payment of the note in full, before the transfer to the Plaintiff. The reply takes issue on the payment; and the cause was argued principally upon the question, whether upon the facts before recited, (which fully appear in the record,) the Defendant is estopped from proving payment according to the allegations of the answer.

The general doctrine to be gathered from the authorities seems to be, that a party is not estopped from proving facts inconsistent with his statements or admissions unless the statement or admission was fraudulent in its purpose, or unjust in its results. It must not only have been made with the intention of misleading, but must actually have misled the other party to his prejudice. And where admissions alone are relied upon, the estoppel is always limited to what may be necessary to put the parties in the same relative position, which they would have occupied, had the admission not been made. Nor will statements or admissions made in one transaction, preclude the party from retracting them in another. 2 *Smith's Leading Cases*, 561-2-3-4; 3 *Hill.*, 219; 4 *Min.*, 217; 5 *Id.*, —; 6 *Hill.*, 534; 18 *Vt.*, 371.

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Let us inquire whether the present case falls sufficiently within these propositions. And first what admissions did the Defendant make? There is no evidence of any admission of indebtedness on the note in any sum whatever, except what may be implied from his statement to the Plaintiff "that the sum of $450 or thereabouts had been paid," without however then, or at any other time, informing him that it had in fact been paid in full. The statement was literally true, but it did not contain the whole truth. Was the statement fraudulent in its purpose? The referee finds that it was made to induce the Plaintiff to believe that the note was valid, and pursuant to an arrangement between the Defendant and Fridley; but it is proper to remark that the only evidence of any arrangement was that Fridley, after he had transferred the note, requested the Defendant not to tell the Plaintiff that there was nothing due on it. But did the statement mislead the Plaintiff to his prejudice, or place him in any different relative position than that which he occupied before the statement was made? When the statement was made the Defendant was not liable, because he had paid the note in full, and the Plaintiff having taken it after it became due, took it subject to every defence that could have been made as against Fridley. Let us suppose that the Defendant then admitted his liability in terms, and to the full extent of the note; and that the Plaintiff had immediately brought his action to recover the amount admitted to be due. Would there have been any injustice in permitting the Defendant to prove that he had paid the note, notwithstanding these admissions? The Plaintiff had not been induced to take the note by reason of anything which the Defendant had said or done; and he had no claim against the Defendant at the time the admissions were made. His relations to Fridley were not at that time changed. He had then parted with nothing, lost no right, nor suffered prejudice in any manner. Surely there would be no equity in making the Defendant pay a debt he did not owe, merely because he had, contrary to the truth, admitted his indebtedness. Had he made the admissions to Fridley, he would not have been concluded by them. Why then should he be deprived of a retraction, when the admissions are made

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to a party who simply succeeds to Fridley's rights. I think we may fairly conclude therefore, that had the Plaintiff sued immediately after the admission was made, the Defendant would not have been estopped from proving payment, even although he had in express terms admitted that nothing whatever had been paid; because the Plaintiff had not as yet been misled to his prejudice,—unless it might be said that he had been induced to incur the expense of bringing an action, and was thereby prejudiced. But that trifling prejudice gives him no equitable claim beyond the actual expense incurred, and it must not be forgotten that the doctrine of estoppel invoked in this case, rests on equitable grounds entirely; and the Defendant would be permitted to prove payment in mitigation of damages, though, possibly, not in bar of the action. 15 *Pick.*, 32.

If then the Plaintiff could not have recovered on the note immediately after the admission was made, at what time thereafter did the right accrue, and by what means was it acquired? Something must have been done to confer the right, for it cannot be that the mere neglect to sue can put the Plaintiff in any better condition than he was before; because it would then be in his power, by delay merely, to create in himself a right which did not previously exist.

But, it is argued, the Plaintiff retained the note on the faith of Defendant's admission, until Fridley became insolvent, whereas had he been fully informed of all the facts, he would have returned it at once, and obtained other security by which his loan might have been saved. A sufficient answer to this position is found in the fact that there is not a particle of evidence to that effect; nor does the referee so find. The Plaintiff who was the only witness in his own behalf does not state that he retained the note any length of time by reason of Defendant's admission; nor that he was misled by it to his prejudice in any particular; nor even that he was led to believe that only $450 had been paid;—and certainly some fact of this nature should have been proved if he expected to derive any benefit from the fact of having kept the note. He should have shown that the admission of the Defendant had a direct and immediate influence upon his conduct. 13 *N. H.*, 360.

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The referee however finds that the Plaintiff was misled, by the statements of the Defendant, and relying upon these statements had made the settlement of October 22, 1857, and renewed the note of Fridley. But let us see how he was misled, or how his conduct was affected, and whether it was to his prejudice. It is evident from the referee's findings in this particular, that the Plaintiff was prejudiced, if at all, by giving time to Fridley upon the settlement. The finding is in substance that the Defendant, in July, 1855, stated to the Plaintiff that about $450 had been paid on the note; that he knew at the time that nothing was due thereon; that he did not then, or ever inform the Plaintiff or claim to him that anything more had been paid, although he had conversations with him both before and after the settlement of October 22, 1857; that he made the statements to induce the Plaintiff to believe that the note was valid; that the Plaintiff was misled by them, and relying upon them, had made said settlement; and that Fridley became insolvent in 1857, but whether before or after the settlement is not found.

It does not appear that the statement about the payment was ever repeated after the first interview, and it was then made in reference to a certain state of facts known to the Defendant. More than two years afterwards the Plaintiff, without consultation with Defendant, or intimating to him his intentions, enters into a new arrangement with Fridley, by which it is claimed their relations to each other are entirely changed, and it is now urged that the Plaintiff was led into making this new arrangement by this statement, and that he is prejudiced thereby. We do not think he can avail himself of an admission made under such circumstances and after such a lapse of time, however full and explicit it may have been. We are by no means satisfied that the settlement of the Plaintiff with Fridley materially changed their relations to each other. The debt and securities remained as before. The change was merely as to the instrument by which the debt was evidenced. When the new note matured, the Plaintiff might have disregarded it and brought his action upon the original consideration or loan; and although the new note suspended the right of action during the time it was

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maturing, yet it is not at all probable that this extension or time was given in consideration of the Plaintiff being permitted to retain the collaterals, for he already had these in his possession, and was authorized to proceed to collect them at any moment; on the contrary we are satisfied from the terms of the new note, and general nature of the transaction, that the extension was solely in consideration of the increased rate of interest which the Plaintiff was thereafter to receive.

But admitting that the settlement with Fridley was a new transaction, entirely changing the relation which the parties thereto previously held to each other, the Plaintiff is even worse off than before; for all admissions are confined to the transaction in which they are made, and are not conclusive or binding on the party in any other, unless made anew and with a full knowledge of the facts. 13 *N. H.*, 360; 18 *Vt.*, 371; 6 *Hill.*, 534. It follows therefore that had the Defendant's admissions been of such a nature as to cut him off from the power of retraction, up to the time when the settlement was made, they would not be binding after that, because they were made in another transaction. We have however endeavored to show that the admission was not conclusive at the time it was made; that the Plaintiff did not acquire any right of action by merely retaining the note in his possession and forbearing to sue upon it, especially as he did not show that he was thereby prejudiced, nor that his conduct in that regard was directly and immediately influenced by Defendant's admission; and if the Defendant had a complete defence up to the time of the settlement with Fridley, it was not in the power of the Plaintiff to deprive him of that defence, by entering into a new arrangement with Fridley, without the knowledge or consent of the Defendant. Instead of advising the Defendant of his intended settlement, the Plaintiff acted, as he did in the first instance, upon his own responsibility entirely, and we think that he is in the same relative position with regard to the Defendant, since the admission, that he would have occupied had the admission not been made. He had no claim upon the Defendant then, and we do not see that he has any claim now. It does not appear that he has lost any right as against the Defendant, or Fridley,

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that can be traced to the Defendant. He only fails to acquire a right that he did not obtain by his contract. He has done or suffered nothing entitling him to the money of the Defendant, nor has the Defendant said or done anything for which he should be made to pay money that he does not owe.

Judgment reversed.

William B. Gere, Appellant, *vs.* William P. Murray, Respondent.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

In cases of voluntary assignments, an unlawful intent appearing on the face of the instrument, vitiates the conveyance. Where the language or provisions of the instrument betray the intent, the proof is deemed conclusive and there is nothing to submit to a jury. Where such is not the case, and the jury find the intent from extrinsic evidence, the result is equally fatal to the validity of the conveyance. The question of fraudulent intent is a mixed question of law and fact: that is, the question of the existence of a certain intent is a question of fact for the jury, (when not disclosed by the papers,) and for the Court to declare whether such intent be fraudulent or otherwise. The fact that the assignee had no knowledge of the fraudulent intent cannot cure the fraud of the assignor. The assignee of an insolvent, accepting the trust, is not a purchaser for a valuable consideration. So, if the jury find that the intent of the assignors at the time of the assignment, was to prevent a forced sale of their property, in order that the business might be continued and the goods sold at retail, the Court should have charged that the deed was void.

This was an action brought to recover personal property, to which the Plaintiff acquired the right and possession by a general assignment from Connor & Son, to the Plaintiff in trust and for the benefit of their creditors. The complaint alleges the assignment, and the possession of the property by the Plaintiff under the assignment before and at the time of the alleged taking, the value of the property, that the Defendant wrongfully took and detained the same from the possession of the Plaintiff, and refused to deliver, &c., although often requested by the Plaintiff, demands judgment for a

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return of the property and damages for the taking and detention, &c.

The answer denies, and puts in issue the allegations of the complaint, and alleges that the assignment was void as to the creditors of the assignors, and that the Defendant took the property as United States Marshal upon an execution in favor of a judgment creditor; a verdict was rendered for the Plaintiff, and a motion made for a new trial and in arrest of judgment; the motion was denied by the Court below, and the Defendant appeals from that order.

Points and Authorities for Appellant.

The Court erred in refusing to charge the jury as requested by Defendant, "that the assignee had no right to carry on the business at retail, and that if it was so intended by the assignors at the time of the assignment, it is void; and in charging that such an intent would only be strongly indicative of fraud, but the question would be for them to decide." *Case, p.* 20, *line* 1. And also in refusing to charge, "that if the intent of the assignors at the time of the assignment was to prevent a forced sale of their property, and in order that the business might be carried on and the goods sold at retail, the deed is void;" and charging that it was a question for the jury, and that such an intent, if so found, would be strongly indicative of fraud.

The Court virtually charged on these two requests, that two questions were before the jury—one as to the existence of a certain intent in the minds of the assignors at the time of the assignment; the other as to whether that intent was a fraudulent one. The Defendant desired the question to be left to the jury as to whether those intents did exist; but if the jury should find that the intent did exist, he then claimed it was a question of law as to whether such an intent was a fraudulent one. The Court below in its opinion on the motion for a new trial, says: "The question for the jury was not simply whether any particular intent existed at the time of the assignment, but whether in view of all the circumstances before them, that intent was a fraudulent one." And then goes on

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to say that it must also appear that the assignee knew of the intent, and co-operated in it.

We think the learned Judge here has clearly erred. The knowledge or co-operation of the assignee had nothing to do with the case. The statute declares that the intent to hinder, delay, or defraud creditors makes the assignment void. *Comp. Stat.*, 459, *ch.* 51, *sec.* 5, "that the title of a purchaser for a valuable consideration shall not be affected unless he had notice of the fraudulent intent of his immediate grantor, or of the fraud, &c." Thus all that is requisite to avoid a sale to a purchaser for a valuable consideration, is a mere knowledge of the fruadulent intent of the grantor—not that he should coincide or co-operate in carrying it out; but simply that he should know that the intent of his vendor in making the sale was to hinder, delay, or defraud his creditors.

It is the simple intent on the part of the grantor, not its accomplishment or success, or its failure. These assignors may have intended to defraud, and yet the assignee might have prevented their carrying out their intent. The assignment is nevertheless void, for the good faith of the assignee cannot counterbalance the bad faith of the assignors.

The assignee in this case was not a purchaser for a valuable consideration, and so not entitled to protection under *sec.* 5. *Burrell on Assignments, page* 484; *Haggerty vs. Parmer*, 6 *Johns. Ch.*, 437; *Slade vs. Van Vechten*, 11 *Paige*, 21.

And consequently, if the assignment was made with an intent to hinder, delay, or defraud on the part of the assignors, it is void, and the Judge in the Court below actually so charged. *Case, p.* 19, *lines* 13 *to* 16.

It would be difficult to reconcile that part of the Judge's charge with his opinion on this motion.

Conceding, then, that it is not necessary that the assignee should be a party to, or cognizant of, the fraudulent intent on the part of the assignors, let us examine the question whether what is a fraudulent intent is a question for the Court or jury:

The history of this statute, copied as it is from New York, is well known. See 2*d N. Y. Rev. Stat.*, 4*th Ed.*, 320. It was passed to settle the law in a certain "class of cases, by which the acts of parties were pronounced fraudulent and

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void in law as against creditors, in the absence of any fraudulent intent, and under a concession by the Court that there was none." "Such is the effect of the note of the revisors in this section." *Cunningham vs. Freeborn*, 11 *Wend.*, 253. "But," says Mr. Justice Nelson, in the opinion in that case, "I apprehend that if there is any provision in the assignment, or any fact admitted in the answer, (the answer in Chancery being evidence, and of course being like any other evidence,) which is *per se* fraudulent according to the law of the case, it is so, the denial of the fraudulent intent to the contrary notwithstanding. That any set of facts, or any intention to be fraudulent, must be a violation of some principle of law since the revised statutes, as well as before, and when the violation of the principle is shown, the intent is the natural and necessary consequence, and the denial of it is senseless and idle."

So we claim to apply that same law to this case; and if making an assignment "with the intention of having the business carried on at retail, and for the purpose of preventing a forced sale of the property, and in order that this business might be continued and the goods sold at retail," is a violation of some principle of law, then we claim that it is equally "idle and senseless" to find the fact of such an intent, and at the same time find such an intent not a fraudulent one.

It is for the law and court to decide what intent is legal and proper, and what illegal and fraudulent. It is for the jury to decide what intent exists; that intent once found, the Court must characterize it.

Because if the jury is to judge what is a fraudulent intent in one case, they must in all, and if the evidence showed an intention on the part of the assignor not to deliver the property, but to retain it to support his family, it would be equally competent for them to declare such an intention not fraudulent, because his family needed it. The question of fraudulent intent, says Judge Nelson, is a "mixed question of law and fact. That is, it is for the Court to declare and charge what is a fraudulent intent, and for the jury to find as to whether that intent exists.

Suppose this precise intent which is embodied in the instructions asked for, had been apparent on the instrument of

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assignment, would it not have been fraudulent on its face? Would not the Court have charged that such an intent was illegal, and that it appearing on the face of the instrument, the evidence of the existence of such an intent was conclusive, and the verdict must be for the Defendant?

And is there any difference between the intent appearing on the face of the instrument, and the same intent being shown *aliunde*, except in the character and conclusiveness of the evidence produced to prove it?

To refer to some cases on this point. In *Griswold vs. Sheldon et al.*, 4 *Comstock*, 581, it was held that a chattel mortgage that on its face permitted the mortgagor to retain possession of the goods, and as circumstances showed, a further agreement that the mortgagor should sell and dispose of them as his own, was fraudulent in law—or in other words, the facts necessarily showed an intent which the law adjudged a fraudulent intent. In *Ecgill vs. Hart*, 5 *Selden*, 213, it was again decided that a chattel mortgage allowing the mortgagor to to retain possession and to sell, though not on credit, was fraudulent. In *Ford et al. vs. Williams*, 3 *Kernan*, 577, the same principle was sustained; and in *Gardner vs. McEwen*, 19 *N. Y. Rep.*, 123, that a mortgage "lawful upon its face, duly filed and proved to be given for an honest debt, is void as to creditors if given under an agreement that the mortgagor might continue the business of buying and selling the goods," &c., Denio, J., holding "that the Defendant was entitled to have the jury instructed that if they found such an agreement existed they must find for the Defendant"—*page* 126.

Thus it seems from these cases that the execution of a chattel mortgage with the intention that the mortgagor shall retain and dispose of the goods, is a "violation of a principle of law," and that when that intention appears on the face of the instrument, it is conclusive evidence of such intent, and the instrument is held void by the Court, or the jury instructed to so find it void. When such an intent is shown *aliunde*, it is the duty of the Court to declare such an intent a "violation of a principle of law," and if the jury find such an intent to have existed, to find against the instrument.

Thus there is really no such thing as fraud in law and fraud

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in fact. Fraud is one and the same; the difference is in the evidence of it. It simply amounts to this, that an instrument which bears on its face the violation of some principle of law, furnishes conclusive evidence of its own invalidity, and has been called fraudulent in law in contradistinction to cases where the evidence of the violation of such principle has appeared *aliunde*. In either case the law decides what may and what may not be done, what intent is lawful and what not; and the jury must decide whether the principles of law as expounded to them, have been violated or not.

It can hardly be necessary to argue that if the assignors had incorporated into their assignment, clauses stating "that the assignee should carry on the business at retail, and that he should make no forced sale, but that the business should be continued and the goods sold at retail," the deed would be void. We claim that we were entitled to go to the jury upon the question whether we had not shown such an intention on the part of the assignors outside of the instrument, and that if the jury believed that we had shown such an intention, we were entitled to a verdict.

If under the assignment as it is the assignee had carried out such an intention, he would have been guilty of a breach of trust. *Hart vs. Crane*, 7 *Page*, 37.

And certainly an act that would be a breach of trust on the part of the assignee, if intended by the assignor at the time of the assignment, would be a fraudulent intent. *Hart vs. Crane*, 7 *Paige*, 37; 18 *N. Y.*, 497.

Points and Authorities for Respondents.

The *sixth* and *seventh* instructions asked by the Defendant's counsel, and which the Court refused to give in the terms asked, we propose to consider together.

SIXTH. "That the assignee had no right to carry on the business at retail, and that if it was so intended by the assignors at the time of the assignment, it is void."

Upon which "the Court charged that the assignee had no right to carry on the business at retail, and that if it were so intended by the assignors, such intent would be strongly in-

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dicative of fraud, but that the question would be for the jury to decide."

SEVENTH. "That if the intent of the assignors at the time of the assignment was to prevent a forced sale of their property in order that the business might be continued and the goods sold at retail, the deed is void."

Upon which the Court charged "that it was a question for the jury, and that such intent, if so found, would be strongly indicative of fraud."

The view of the counsel and these instructions, were clearly based upon the decisions of the Supreme Court of the State of New York, which created the necessity of that provision of statute from which ours is copied, making "the question of fraudulent intent in all cases a question of fact, and not of law." See *Comp. Stat.*, *sec.* 4, *p.* 459.

The requests are, that the Court will submit to the jury and direct them to find only whether the assignors intended that certain acts or things should transpire after making the assignment, whether the intent existed, to have the business carried on at retail. Whether they intended to prevent a forced sale, and if so, then the Court should decide that such intent was fraudulent *per se*, not submitting the question of fraudulent intent to the jury, but submitting to them the question only whether an intent existed that certain things should be done, which if done, would be evidence of a fraudulent intent, and, asking the Court to determine that the fraudulent intent did exist as a matter of law.

Suppose the jury had found that the assignors did intend to prevent an immediate forced sale of the property, and intended that the goods should be sold at retail, is such finding anything more than evidence of the fraudulent intent. Strong evidence, perhaps, but not conclusive; it may be explained by other evidence equally strong and satisfactory to the jury to show that no fraudulent intent, in fact, existed, and that is the very question for the jury (not the Court) to determine.

Nearly every assignor in embarrassed circumstances, who makes an assignment in good faith for the benefit of his creditors, may fairly be presumed to intend to prevent the sacrifice of his property by an immediate forced sale on execu-

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tions, because it is for the benefit of his general creditors that he should do so; such is the ordinary effect and consequence of all general assignments, which must necessarily produce more or less delay in the application and distribution of the debtor's property to the payment of his debts.

And the time and manner of disposing of the property, most advantageously to the creditors, whether at wholesale or retail, whether in large or small quantities, must always depend much upon the kind, character and availability of the property, and must necessarily rest to a reasonable extent in the discretion of the assignee. *See Burrill on Assignments, pp.* 104, 185-6; 11 *Wend.*, 253-4; *Cunningham vs. Freeborn*, 2 *Conn.*, 633; *Deforest vs. Bacon*, 13 *Ib.*, 383; 12 *Pick.*, 451;

The property in this case, as the evidence shows, consisted chiefly in patterns or piece goods, trimmings, &c, such as are usually kept in a Tailor's furnishing store, designed to be made up and sold to the orders of customers—the amount was not large—and that was the most available and advantageous mode of disposing of them for the interest of the creditors, and there is nothing in the evidence tending to show that the time required to dispose of them in that way, was unreasonable, or that the assignors intended that the manner of selling the goods should produce any unnecessary delay in the performance of the trust.

All these facts were in evidence before the jury, and were proper for them to consider in determining the question of fraudulent intent.

And, although the assignors might have intended that a large portion of the goods should be sold at retail, and the business of manufacturing them, carried on for that purpose, yet, if the jury were satisfied from the evidence in the case that such was the most advantageous mode of disposing of the goods for the benefit and interest of the creditors, and the assignors were acting in good faith toward their creditors, the instructions asked would have been clearly erroneous. Under such instructions of the Court they would be compelled to find a fraudulent intent. When in fact they were satisfied from the evidence that no fraudulent intent existed.

It is for the Court to instruct the jury what the evidences

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of fraudulent intent are—what the indications and badges of fraud are—and for the jury to find whether that fraudulent intent exists or not.

And this principle is asserted in the case of *Cunningham vs. Freeborn*, 11 *Wend.*, *p.* 254, cited by Appellant's counsel. Justice Nelson says: "The idea that the assignment was a mere private arrangement by the debtor for his own benefit, and that the assignee is a trustee for him; the omission of schedules at the time of the assignment; the fact that the trustee had paid none of the debts at the time of his answer; the manner in which he had conducted the establishment, these and all other like facts are not *per se* fraudulent. These are grounds, and some of them very strong, from which to raise such a presumption, but all are subject to explanation."

In that case the assigned property consisted of an iron foundry, machinery, steamboat, wares and material wrought and unwrought, and the assignment contained an express provision that the assignee should continue to use and operate the establishment, as it had been before the assignment, to work up and manufacture the materials and sell them, &c., yet the assignment was held good.

In the case at bar the questions do not arise upon the face of the assignment, but upon evidence *aliunde* upon which it is attacked.

The assignment is admitted valid upon its face, and the Defendant attacks it as fraudulent upon other evidence.

If the assignment contained provisions which were fraudulent in law upon its face, then the question of intent might be determined by the Court without the aid of other evidence, and such are the cases cited by the Appellant. *4th Coms.*, *Griswald vs. Sheldon*, *p.* 581, was where the property was claimed under a chattel mortgage which contained a stipulation that the mortgagor should retain possession of the goods, and conferred on him the power to sell and dispose of them as his own, therefore held void as to creditors.

The case cited by Appellant in 5 *Selden*, *p.* 212, *Edzell vs. Hart*, was a case where the Plaintiff claimed a stock of goods under a chattel mortgage which contained a stipulation that the mortgagor should remain in possession, and further stipu-

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lations which the Court said by necessary implication authorizes him to sell the goods as his own for cash, held that the mortgage was void upon its face as to creditors.

The case cited in *3d Kernan, p. 577, Ford et al. vs. Williams*, it was held that where the mortgagor of a stock of goods is allowed by the mortgagee to retain and sell them at retail, at his discretion and for his own benefit, the mortgage is fraudulent as to creditors.

On the trial the judge charged that the mortgage was presumptively fraudulent, and the burden of showing it honest was on the mortgagees, and the charge was held to be correct.

The case cited by the Appellant in 19 *N. Y. Reports, p.* 123, arose upon a chattel mortgage containing a similar agreement to those above mentioned.

Thus it will be seen upon examination that no one of the cases cited by the Appellant upon this point, even tends to support his theory, or is at all applicable to the question in the case at bar.

All these cases arose upon the express agreement of both parties to the instrument, and was contained in the instrument. But in this case the question is based upon the mental intention of the assignors, not expressed by them or assented to by the assignee.

But let us examine this question in another aspect.

The theory of the Defendant is based entirely upon the intention of the assignor at the time of the assignment. The assignment is valid and free from objection upon its face, when it was delivered to, and the trust accepted by the assignee, all the creditors became interested in and acquired the right to have the trust executed and carried out according to the terms of the assignment.

Now in the language of the decision of the Court below given upon the motion for a new trial, from which I quote:

"Suppose that the jury were satisfied that the assignors did intend to have the business carried on as usual, is that conclusive? Must it not appear that the assignee knew of such intent and coincided or co-operated in carrying it out? May the assignee not show that he was acting in good faith and in strict conformity to the terms of the assignment, and

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show that the assignors had precluded themselves from effecting their purpose by executing a valid assignment and selecting an honest assignee to carry it out. The Defendants' position amounts to this, that no matter how honest the assignee is, or how perfectly valid the assignment itself may be, no matter how fairly and expeditiously the assigned property may have been disposed of and applied to the purposes specified in the assignment, if the assignors intended a fraud, though such intent did not become operative upon the property, the assignment is void, and a creditor levying upon the assigned property will be protected. I cannot think that this doctrine will be sustained; certainly none of the authorities cited sustain it. In those cases the question arose upon the face of the instrument, and where there was no evidence to counteract the presumption of fraud, and it was properly held that the question was one of law, and not of fact. But there is a plain distinction between a case where by the terms of the instrument (binding upon the assignor and assignee) that must necessarily result in delay to creditors, or legal fraud, and a case where the instrument is valid, and the assignee gives evidence of good faith on his part and only the intent of the assignor is shown or claimed to be fraudulent; in the latter case (which is substantially this case,) the most that can be claimed is that such intent of the assignor, if found, is strongly indicative of that measure and completeness of frauds which will vitiate the assignment, though liable to be disproved or rebutted by evidence of good faith on the part of the assignor, and a fair and speedy disposition of the trust property."

In support of the views here expressed, see *Burrill on Assignments, pp.* 395-6; 4 *Sandford*, 287; 6 *Hill.*, 438.

Allis & Peckham, Counsel for Appellants.

M. E. Ames, with Smith & Gilman, Counsel for Respondent.

By the Court—Atwater, J.—The counsel for the Defendant requested the Court to charge the jury, "that the assignee had no right to carry on the business at retail, and

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that if it was so intended by the assignors, at the time of the assignment, it is void." The Court refused so to charge, but charged that the assignee had no right to carry on the business at retail, and that if it were so intended by the assignors, such intent would be strongly indicative of fraud, but that the question would be for them to decide.

The Court was further requested to charge, "that if the intent of the assignors at the time the assignment was to prevent a forced sale of their property and in order that the business might be continued, and the goods sold at retail, the deed is void." The Court refused so to charge, but charged that it was a question for the jury, and that such intent, if so found, would be strongly indicative of fraud.

We think the learned judge erred in refusing to charge as requested, especially in the form last stated. This Court has repeatedly held that an unlawful intent appearing on the face of the instrument, (in cases of voluntary assignments) would vitiate the conveyance. 2 *Min.*, 264, *Greenleaf vs. Edes*; 3 *Ib.*, 364, 377, 389; 4 *Ib.*, 204. Certainly there can be no difference in principle, or in the nature of the fraud, whether the unlawful intent appear on the instrument of conveyance, or be discovered by evidence *aliunde*. The statute is broad, and makes every conveyance made with the intent to hinder, &c., void as against the person so hindered, &c. Whenever the obnoxious intent is proved, the law declares the conveyance void, and the jury have nothing further to do with the matter. Where the language or provisions of the instrument betray the intent, the proof is deemed conclusive, and there is nothing to submit to a jury. Where such is not the case, and the jury find the intent from extrinsic evidence, the result is equally fatal to the validity of the conveyance. *Sec.* 4 *of chap.* 51, *of Comp Stat.*, is not more applicable to a case submitted to a jury, where the question of fraudulent intent is involved, than to any other; for if anything more is to be ascertained by a jury than the existence of a certain intent, then, however palpably fraudulent an instrument of assignment might appear on its face, it must still be submitted to a jury. But where the intent to do a certain act is admitted or proved, and the necessary consequence or result of that act

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is to hinder, delay or defraud creditors, it would be idle to permit a party to go to a jury on the question of the legality of such act. The Courts have uniformly refused it, and it is to be hoped that the salutary rule which has been established is not soon to be changed.

The New York statute relative to fraudulent conveyances, (of which ours is a copy,) has been more fully discussed in the Courts of that State, than almost any other branch of the law, and it is unnecessary here to travel over the ground which has been so thoroughly examined. We gather as the result of their investigations, that the question of fraudulent intent is a mixed question of law and fact, that is, that the question of the existence of a certain intent is a question of fact for the jury, (when not disclosed by the papers) and for the Court to declare whether such intent be fraudulent or otherwise. This view we think consistent with the language of *sec.* 4 *of chap.* 51, above cited. I think the true meaning and fair construction of the language there used, is the same as though it read "the question of the existence of fraudulent intent in all cases," &c., and if so read, it could scarcely be claimed that the Statute authorized the jury to determine what constituted a fraudulent intent. If the jury find "the intent of the assignors at the time of the assignment, was to prevent a forced sale of their property in order that the business might be continued and the goods sold at retail," the effect of such intent upon the conveyance must be precisely the same, as if such intent had been written out in the instrument of conveyance itself. Nor would the fact that the assignee had no knowledge of such intent, render the assignment any the more valid. It is the fraud on the part of the party making the conveyance that the statute is intended to reach, and the innocence of the assignee in the premises, cannot cure the fraud in the makers. *Secs.* 1 *and* 5 *of chap.* 51 clearly show that the fraudulent intent on the part of the maker of the conveyance is what vitiates the same, and indeed, it must be apparent that any other construction would render the statute almost wholly nugatory. And see *Hildreth vs. Sands*, 2 *Johns. Ch. R.*, 42-3, and cases there cited; *Burr. on Ass.*, 2*d Ed.*, *p.* 422; 1 *Sand., Ch. R.*, 85; 18 *Bar.*, 272; 24 *Barb.*, 120-1; 10 *Pick.*,

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408; 1 *Curtis*, 157. We do not understand the remarks in *Sands vs. Hildreth*, 14 *John.*, 493, to conflict with the views here expressed, as an assignee of an insolvent, accepting the trust for the benefit of creditors, is not regarded as a purchaser for a valuable consideration.

Assuming therefore, that the jury find that the intent of the assignors at the time of the assignment was to prevent a forced sale of their property in order that the business might be continued and the goods sold at retail, was the Defendant entitled to the charge that the deed was void? We think he was, and that the Judge erred in refusing so to charge. The law recognizes and tolerates no right on the part of an insolvent assigning for the benefit of creditors, to interfere with or make any arrangement whatever with reference to the assigned property after its transfer to the trustee. The only intent consistent with the *bona fides* of the transaction on his part is, that the property be devoted absolutely, unreservedly, and in the shortest time possible for the best interests of his creditors, to the payment of his debts. The law regards the property of the debtor as of right, belonging to his creditors, and sanctions no scheme or device to deprive them of it. The intent to prevent a forced sale of the property alone, might not be inconsistent with the purpose to protect the rights and interests of creditors, but such an intent harbored with the design of continuing the business and selling the goods at retail, is clearly inconsistent with such purpose, or at least, if carried into effect, might indefinitely prolong the time of payment, if not entirely prevent it. The law declares such intent fraudulent, and it is not for the jury to say, that in fact it was not so. *Griswold vs. Sheldon et al.*, 4 *Comstock*, 581; *Edgill vs. Hart.*, 5 *Sel.*, 218; *Ford et al. vs. Williams*, 3 *Ker.*, 577; 19 *N. Y.*, 123, and cases cited. In the most or all of these cases the intent declared fraudulent appeared on the face of the instrument of conveyance, but as in the view of this Court it makes no difference whether the intent so appear, or from evidence *aliunde*, the principles there established are applicable to the case at bar.

The judgment is reversed and a new trial granted.

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D. Morrison & Co., Appellants, *vs.* Lovejoy & Brockway, Respondents.

APPEAL FROM THE DISTRICT COURT OF HENNEPIN COUNTY.

If a juror is challenged for actual bias and the parties by consent submit the question of bias to the Court, the finding of the Court thereon is conclusive.

If the truth of a challenge be admitted by the other party, there is nothing left to be tried; and it is not error for the Court to refuse to permit the juror thereafter to be examined by the party challenging, nor to refuse him permission to withdraw his challenge.

Where a written executory contract specifies the time during which such contract is to continue, the time is material; and it cannot be shown by parol, contrary to the terms thereof, that in a certain contingency the contract was to be determined prior to the time therein specified.

The counter-claim authorised by the *second subdivision of section* 71, *page* 541, *of the Compiled Statutes*, extends to all claims for damages arising *ex contractu*, and existing at the commencement of the action, whether such damages are liquidated or unliquidated.

Under the written executory contract for the manufacture of lumber at certain mills during a given term, at a specified price per thousand feet, one party agreed to furnish logs for manufacturing to the full capacity of the mills during the continuance of the contract, and the other party to employ the mills exclusively for the party furnishing, during said term; but before the expiration of the term the former refused to furnish, or to proceed further under the contract. *Held*, in an action by the manufacturer, that he could not treat the contract as continuing after such breach, and recover the contract price for the lumber which he could have manufactured under said contract up to any specified time, without averring and proving a continuing readiness and ability to perform on his part. That he might however treat the contract as terminated and sue at once for the damage sustained by such breach. That in such a case his damages would be measured by the value of the contract to him at the time of the breach. And that the value of such a contract depended upon the profits which the manufacturer would have realized therefrom had it been continued and faithfully performed during the term. But that in estimating such profits the rent, or value of the use of the mills and necessary machinery, should be taken into the account as a part of the cost of manufacturing.

This action comes up on appeal by the Defendants from the decision of the Court refusing to set aside the verdict of the jury, and to grant a new trial. The action was brought by the Plaintiffs to recover a balance due them upon a written contract under seal, and also to recover damages for the breach of the contract. The substantial provisions of the contract are stated in the opinion of the Court; also the facts set up in the answer as a defence.

The action was tried in August, A. D. 1860, in the District Court of Hennepin county, by a jury, and a verdict rendered for the Plaintiffs, and a motion made for a new trial by the Defendants, upon a case prepared and settled under the statute.

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The motion for a new trial being overruled, the Defendants bring the case to this Court by appeal.

Points and Authorities of Appellant.

I.—That a juror who has formed an opinion, and has a fixed and settled conviction in reference to any one of the issues in the case he is called upon to try, is disqualified to sit, from actual bias.

II.—That the challenging party has a right to interrogate the juror challenged, for the purpose of ascertaining if he be biased, whether the grounds of challenge are traversed or not by the opposite party.

III.—That the party interposing a challenge to a juror, has the right to withdraw his objection or challenge at any time before the trial of such challenge has been commenced, and especially when no preliminary questions have been asked.

IV.—That to enable a party to recover special damages for an alleged breach of an executory contract, containing mutual and concurrent covenants and agreements, and which is claimed to be a subsisting contract, he must not only aver, but prove a readiness and ability to perform upon his part; and in the absence of such averment, no evidence of such readiness or ability is admissible. *Risinger vs. Cheny*, 2 *Gilman* 84, 7 *U. S. Dig., p.* 31, *sec.* 222; *Porter vs. Rose*, 12 *John*, 209; *Green vs. Reynolds*, 2 *John.* 208; *Parker vs. Paraiale*, 20 *John*, 130; *Denham vs. Petee*, 4 *Seld.*, 508; *Cornwall vs. Haight*, 8 *Barb.*, 331–2; *Topping vs. Root*, 5 *Cow. R.*, 404; *Williams vs. Healey*, 3 *Denio*, 363; *Johnson vs. Wygant*, 11 *Wend.*, 48.

V.—That even had the plaintiff averred a readiness and ability to perform, such readiness and ability must be continuing; and it having appeared on trial that they surrendered the possession of the mills to the lessors, December 12, 1857, thus demonstrating their inability to perform, they could not, under any circumstances, recover for such alleged breach, beyond that period. *The Dutch Church vs. Bradford*, 8 *Cow. R.*, 457, 500, 521–22.

VI.—That it was error in the learned judge who tried the

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case in the court below, to admit testimony in respect to the capacity of the mills in the absence of any averment of their capacity.

VII.—The rule of damages for the alleged breach by the defendants of the contract, set out in the complaint, is not the profits that might have been realized by the plaintiffs had they continued to mannfucture lumber under the contract, for the period for which damages are claimed; because,

1st. There is no rule by which such profits can be ascertained, or data upon which to estimate the quantity of lumber that would have been manufactured at these mills during that period.

2nd. Such damages would be therefore, uncertain, remote, and speculative, instead of direct, certain and actual. *Freeman vs. Chute*, 3 *Barb.*, 424, 2 *Greenleaf Ev. sec.* 261; *Blanchard vs. Ely*, 21 *Wend.*, 342; *N. Y. & H. R. R. vs. Story*, 6 *Barb.*, 422–3; *Clark vs. Mussiglia*, 1 *Denio*, 317; *Jones vs. Van Patten*, 3 *Ind.*, 107; *Wilson vs. Mintin*, 1 *Denio*, 603; *Sedgwick on Damages*, (*marg.*) 202, *note* 1; 2 *Parsons on Contracts*, 458; *Sedgwick on Damages*, 210-11; 1 *Lead. Ca. in Eq.* 5, 79-80; 2 *Lead. Ca. in Eq. pt.* 2, *pp.* 12-13; 2 *Smith Lead. Ca.*, 5*th Am. Ed.*, 23, 24, 26, 28, 37, 38, 39, 42, 43, 44, 46, 48.

VIII.—That the plaintiffs were not permitted to lie idle after the alleged breach, for the purpose of enhancing the losses which might be sustained or the damages they might recover, but were bound to use proper diligence and exertions to prevent loss; and if they failed to do so, cannot now look to the defendants for indemnity. 2 *U. S. Dig. p.* 1, *sec.* 3; 7 *Green R.* 51; 6 *Greenl.*, 208; 2 *U. S. Dig., p.* 10, *sec.* 195; *Miller vs. Mariners' Church*, 3 *Green R.*, 51, 55 & 56; *Heckscher vs. McCrea*, 24 *Wend.*, 308, 309, 310, 313, &c.; *Jones vs. Van Patten*, 3 *Ind.*, 107; 2 *Greenl. Er.*, 261; *Davis vs. Fish*, 1 *Iowa*, 407; *Sedgwick on Damages*, (*margin*) 202, *note* 1; *Taylor vs. Read*, 4 *Paige, ch.* 568 *to* 574; *Shannon vs. Comstock*, 21 *Wend*, 457; *Cow. Treat. par.* 1508.

IX.—That in offering or essaying to prove the contents of a written instrument, it was error in the Court below to permit plaintiff's Counsel to ask the witness the question, "For

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what purpose was the assignment made?" as the purpose could only be determined by showing the contents themselves.

X.—That two or more written instruments made and entered into at the same time, between the same parties, and in respect to the same subject matter, are part and parcel of the same transaction, and may be connected by parol evidence. 1 *Greenl. Ev. sec.* 283 *and note* 2; *Chitty's Cont.* 89 *and notes*; *Whitehurst vs. Boyd*, 8 *Ala.*, 375; *Sewell vs. Henry*, 9 *Ala.* 34; *Cornell vs. Todd*, 2 *Denio*, 130.

XI.—That parol evidence of the facts and circumstances attending the making and execution of a written agreement, the situation of the parties at the time, and the inducements or considerations which led to its execution, is admissible for the purpose of showing the real object of the parties to such agreement; and especially so, where a fraudulent use or application of such agreement is attempted by either of the parties thereto; the fraudulent use being just as effective in opening the transaction to parol inquiry, as though there had been fraud in obtaining it. 1 *Green'f Ev. sec.* 284, 285, 286, 304; *Chitty on Cont.*, 54-5 *and notes*; *Hadley vs. Boxendale*, 36 *Eng. L. & Eq., sec.* 398; *same case* 9 *Exqr.*, 341; *Sedg. on Damages* (*marginal page*) 200, 202, *and note*; *Bellinger vs. Kits*, 6 *Barb.*, 278; *Wilson vs. Troup*, 2 *Cow.*, 228, *&c.*; 1 *Smith L. Cases*, 507; *Oliver vs. Oliver*, 4 *Rawl.* 143, *and cases there cited*; *Comrs. vs. McCalmet*, 3 *Penn. Rep.*, 122; *McCrea vs. Pannant*, 6 *Wend.* 460.

XII.—That when parties have agreed upon a compromise of existing differences, and such compromise consists in several apparently distinct and independent executory parts, evidenced by as many distinct and apparently independent instruments of writing, parol evidence is admissible to connect the one with the other, and to show that they were in fact a part and parcel of the same transaction or scheme of compromise; and particularly where an attempt is being made to claim either part as independent of the others, or make other fraudulent use of it. 1 *Smith's Lead. Ca.* 445, *Cumber vs. Wane*; 1 *Greenl. Ev. sec.* 283, 284 *a* & 302; 1 *Mass.*, 279; *Parkhurst vs. Van Courtland*, 14 *Johns*, 15 *to* 35; *Moransy vs. Quarles*, 1 *McLean*, 195; *Dorr vs. Chamberlain*, 5

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McLean, 581-2; 3 *Phil. Ev.* (*C. & H. notes*) *note* 984, *pp.* 1473 *&* 1474; *Roach vs. Cusine*, 9 *Wend.*, 232; 3 *Phil. Ev.* (*C. & H. notes*) *note* 958 & 976, *p.* 1462.

XIII.—That an offer to prove the existence and terms of a prior parol agreement, not inhibited by the Statute of frauds, the legal effect or operation of which if proved, might or would be to rescind or avoid a subsequent written agreement between the same parties, is not an offer to change or vary the terms of such subsequent agreement, in contemplation of the rule which excludes parol testimony when offered to change or vary the terms of a written agreement, especially where there is nothing in the prior parol agreement which is at all in conflict with the the terms of the subsequent written agreement. 3 *Phil. Ev.* (*C. & H. notes*) *note* 961, *p.* 1432; *note* 969, *p.* 1450; 1 *Lord Raymond*, 464; *Oliver vs. Oliver*, 4 *Rawdle*, 143; *Dinkle vs. Minshall*, 3 *Binn*, 588; *Christ vs. Diffenbach*, 1 *S. & R.*, 464; *Hultz vs. Wright*, 16 *S. & R.*, 345; *Chitty on Cont.*, 96 *and notes; Wallace vs. Baker*, 1 *Binn*, 616; 3 *Penn.*, 122.

XIV.—That the Court below erred in rejecting the offer of Defendant's Counsel found on folios 95 and 96 of case, to put in evidence the agreement and supplemental agreement found on folios 122 and 143 of record; and also in rejecting the offer to prove the breaches by Plaintiffs, of such agreement and supplement, and the damages resulting therefrom. *Ives vs. Van Epps*, 22 *Wend.*, 155; *Beardsley vs. Stoner*, 7 *How. Pr. R.* 294; *Davidson vs. Remington*, 12 *How. Pr. R.*, 310; *Page vs. Angel*, 8 *How. Pr. R.*, 335; *Lemmon vs. Truel*, 13 *How. Pr. R.*, 248, *and cases there cited.*

XV.—The Court below erred in excluding the articles of submission, so called. 1 *Greenl. Ev. sec.* 283.

XVI.—That it was competent for Defendants to show what the consideration of the contract set out in the complaint was, and that the same had failed in whole or in part. *Sedgwick on Dam.*, 178-9; *Bingham vs. Wildenax*, 1 *Comst.* 509; *McCrea vs. Pannant*, 16 *Wend.*, 460, *and cases there cited.*

XVII.—That where a compromise has been made, consisting of several distinct executory parts, if one part of it fails, it all must fall: no other branch of it can be enforced when

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one branch has become impracticable or impossible—each part being the consideration of the other. 1 *Smith's Lead. Ca.* 507; *Nave vs. Fletcher*, 4 *Littell*, 242.

XVIII.—That the price at which the Defendants may have sold lumber manufactured by the Plaintiffs at these mills, was not evidence of the fact that the lumber was well or properly manufactured.

XIX.—That if the Plaintiffs failed to manufacture the lumber for the Defendants in a proper manner and with prudence and economy, so far as the mills would cut and the logs would make the same, then the Defendants were absolved from furnishing any more logs under the contract, and were justified in abandoning it, even though it had been an independent contract. *Cumber vs. Wane*, 1 *Smith's Lead. Ca.* 463; 4 *U. S. Dig. p.* 30, *sec.* 687; 2 *Gilman* 84.

XX—That even if the Plaintiffs' damages are to be measured by the probable profit which they might have realized out of the manufacture of lumber under the contract, from September 2, 1857 to September 1, 1858, then, in estimating these profits, the jury must take into consideration, as a part of the cost of manufacturing said lumber, the rents which the Plaintiffs were paying for the mills, and also the value of the Plaintiffs' services; and the Court below erred in refusing to so instruct the jury, when requested by Defendants' counsel.

XXI.—That the Court below erred in refusing to charge as requested by Defendants' counsel, "that the re-entry by the lessors of the mills, in December 1857, absolved the Plaintiffs from the payment of rent after the date of such re-entry." 7 *U. S. Dig., p.* 31, *sec.* 222; *Dyett vs. Pendleton*, 8 *Cow.*, 727.

XXII.—That the Court erred in charging the jury, "that if the Defendants, knowing the manner in which the lumber was manufactured, accepted it from the Plaintiffs without finding fault, and as a compliance with the contract on the part of the Plaintiffs, in respect to its manufacture, the Defendants are precluded from now urging that it was not well manufactured," for these reasons:

1st. There was no evidence upon which to base such charge.

2d. The evidence of the witnesses of the Plaintiffs and Defendants was to the exact contrary.

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3d. It was not therefore called for by the case and was calculated to mislead the jury. *Lomax vs. Bailey*, 7 *Black.*, 599; *Cauley vs. Ingersoll*, 4 *id.*, 493; *Linard vs. Patterson*, 3 *id.*, 353; *MeIntire vs. Morris*, 14 *Wend.*, 94.

XXIII.—That receiving the lumber manufactured by the Plaintiffs out of Defendants' logs, and making payments upon it, was not evidence of its acceptance by them, as manufactured by Plaintiffs in accordance with the contract; and the Court erred in so charging. 2 *Smith's Lead. Ca.*, 5*th Am. Ed.*, 33; *Le Duc vs. Legrruaue*, 24 *Wend.*, 60; *Chitty Cont.*, 406-7 *and notes.*

XXIV.—The Plaintiffs, by direct averment in their pleadings, having alleged and declared under oath, that they were not, in any manner, bound to saw logs for the Defendants, at any time after the 3d day of February, 1857, they are estopped from showing or claiming anything to the contrary; and such having been the case, there could be no obligation on the Defendants to provide logs, as there was no mutuality of obligation.

XXV.—The verdict of the jury was contrary to the law and against the evidence.

Points and Authorities for Respondents.

I.—The first objection which the record discloses is in connection with the empannelling of the jury. One Julius Haus being called as a juror was challenged by the Defendants for actual bias, which challenge was denied by the Plaintiffs' counsel, and thereupon the matter was submitted to the Court without the intervention of triers. The Court found the challenge not true—to which finding counsel for the Defendants excepted.

The decision of the Court upon the question of *fact*, was final, and there is no such thing as taking exception and having the matter reviewed by this Court. See *section* 35, *page* 775, *Statute.*

One George E. Huy, also called as juror, was challenged by the Defendants' counsel for actual bias, and the challenge admitted to be true by counsel for Plaintiffs. Whereupon,

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the counsel for the Defendants insisted upon the right to interrogate said juror as to whether said challenge was true or not. To which counsel for the Plaintiffs objected, on the ground that there was nothing to try—which objection was sustained by the Court, and exception taken by Defendants' counsel. That thereupon Defendants' counsel offered to withdraw the challenge to said juror, to which said counsel for Plaintiffs objected, upon the ground that the challenge having been made and admitted to be true, the question as to the competency of said juror was determined; which objection was sustained by the Court, and exception taken by Defendants' counsel.

There was certainly no error in this. The counsel had the right to challenge the juror or not. If challenged, counsel upon the other side must either admit or deny the challenge. If denied, it must then be tried. If admitted, that ended the matter, and the juror must stand aside. *See.* 28, *page* 775, *Statute.*

II.—Plaintiffs called James A. Lovejoy, one of Plaintiffs, as a witness, and, after proving amount of work done by Plaintiffs under the contract, and balance due from Defendants up to September 1, 1857, and the breach of the contract by Defendants at that time, in refusing to furnish any more logs, and forbidding Plaintiffs from further performing under said contract, and the action of the parties at the time, as shown by exhibits A, B, C, and D, Plaintiffs' counsel put the following question to the witness:

"Were you prepared to go on and saw lumber in accordance with the contract, had logs been furnished you?"

"Which said question and answer thereto was objected to by Defendants' counsel, on the ground that no readiness or ability to go on and perform said contract by Plaintiffs is averred in said complaint, and that the evidence is irrelevant and immaterial. Which objection was overruled by the Court and the question answered by the witness, and exceptions taken by Defendants' counsel."

There was no error in this ruling of the Court. In the first place, it was not necessary for the Plaintiff to allege or prove a readiness or ability to go on and perform the contract on

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their part in direct terms. An allegation that they had in all things performed the contract on their part, up to a certain period, at which time the Defendants broke the contract by refusing to furnish more logs to be sawed, and forbidding the Plaintiffs from further performing under the contract, with proof in support of such allegations, would have been sufficient to entitle the Plaintiff to recover, especially in view of that provision of the contract which reads as follows:

"And it is further understood and agreed by the parties hereto, that in construing this contract, the undertakings and agreements on the part of the said parties of the second part, (the Defendants,) to be performed and kept, shall be construed to be, and shall be conditions precedent to the performance of and undertakings of the parties of the first part, (Plaintiffs,) so far that in case the said parties of the second part shall fail to furnish and supply the logs, in manner herein before stated, unless prevented by Providential acts," "then it shall and may be lawful for the said parties of the first part to annul and rescind this contract, and sue for and recover, of said parties of the second part, any damages which they may have suffered, by reason of the nonperformance of the terms of this agreement, or any part thereof." 8 *Barb.*, 426; 21 *Wend.*, 457.

But whether necessary or not, the complaint does allege substantially a readiness and ability on the part of the Plaintiffs to go on and perform the contract.

It contains the following allegations:

"That the Plaintiffs have at all times and in all things kept and performed their said contract; that the Defendants have not kept and performed said contract, but have broken and violated the same."

"That the Defendants, on the 2d day of September, 1857, refused and neglected, and ever since that time have neglected and refused, to furnish and deliver to the Plaintiffs any logs to be manufactured under and by the provisions of said contract, and then and there forbade the Plaintiffs cutting, sawing or manufacturing lumber from logs which Defendants had delivered to the Plaintiffs to be manufactured under said contract;" "and then and there refused to go on under the provisions of said contract."

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"The Plaintiffs say that they have suffered and sustained damages in consequence of the non-furnishing of logs as provided in said contract, and Defendants refusal to perform the conditions thereof in that respect, in the sum of two dollars and ninety-eight cents for each and every thousand feet of lumber which said Plaintiffs could manufacture between said 2d day of September, 1857, and the first day of September, 1858. That the Plaintiffs could and would have manufactured and piled during said time, in all things according to said contract, thirty-four millions seventy-one thousand feet," &c.

These allegations were amply sufficient. To show that the Plaintiffs were prepared to go on was but introductory, or paving the way to show what they could have done.

III.—After having proved the breach of the contract by the Defendants, "the general proposition was then made by the Plaintiffs' counsel to prove Plaintiffs' damages by showing the amount of lumber they could have manufactured during the one year after September second, 1857, (date of the breach,) and the cost of manufacturing the same, and thus determine the measure of damages."

The question here raised involves the rule by which the Plaintiffs' damages are to be estimated for the breach of the contract.

We claim as the rule the difference between the contract price and the cost on what could have been manufactured during the time for which damages are claimed.

The Defendants claim that such a rule would be giving remote and speculative damages which the law does not allow.

It is admitted that remote and contingent damages, depending on the result of successive schemes and investments, are never allowed for the violation of a contract. But no principle of law is better settled than that profits or advantages, which are the direct and immediate fruits of a contract entered into between parties, constitute the true measure of damages for the breach of such contract. The rule contended for in the case at bar falls directly under this latter principle. *Masterson & Smith vs. The Mayor, &c., of Brooklyn*, 7 *Hill*, 62, is directly in point, and a leading case in this country upon the subject, and the attention of the Court is respectfully asked to its careful consideration.

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This case is especially referred to and approved in *Seaton vs. 2d Municipality*, 3 *La. Annual R.*, 45. Also by the Supreme Court of the United States in the case of *P. W. & B. R. R. Co. vs. Story*, 13 *How.*, 307. Also, *Lawrence vs. Wardell*, 6 *Barb., S. C. R.* 423; *N. Y. & H. R. R. Co. vs. Story*, 6 *Barb., S. C. R.*, 419; *Clark vs. The Mayor*, 3 *Barb. S. C. R.*, 288, *Clark vs. The Mayor*, 4 *Comstock*, 338; *Rayalton vs. R. & W. Turnpike Co.*, 14 *Vt.*, 311 *and* 324; *Clifford vs. Richardson*, 18 *Vt.*, 620; *Sedgwick on Damages*, 73, 226–7, 364; *Parsons on Contracts*, *vol.* 2, *pp.* 460–1, *and notes.*

The damages claimed in the case at bar are the immediate and direct consequence of the breach of the contract, and can be determined with great accuracy. The price to be paid the Plaintiffs was fixed by the contract. The quantity of lumber the mills would cut, and the cost, could be shown by any person acquainted with the mills and business. There can be no question as to the competency of the testimony offered.

IV.—The Plaintiffs having concluded the testimony on their part, the fourth point arises upon testimony offered by the Defendants and excluded by the Court. The contract, it will be noticed, provides that it shall continue in full force, and be binding between the parties "from and after the day of the date of this agreement, until the 15th day of May, 1860. There is no contingency mentioned in the contract by which it is sooner to terminate than the 15th of May, 1860, unless the mills are destroyed by fire or floods. The answer alleges in substance that, at the time this agreement was entered into, there was a verbal understanding between the parties that it should terminate on the first day of September, A. D. 1857, provided a certain award was not made by that time by arbitrators appointed to settle certain former differences between the parties, and that no such award was ever made, whereby, it is claimed, the contract ceased to be binding between the parties at that time. This allegation in the answer could have been demurred to, but in order to save time, it was thought best to let it stand, and object to testimony offered in support of it at the trial. At the trial the Defendants offered testimony in support of this allegation in the answer, which was objected to and excluded by the Court. The offer was

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made two or three times in different forms, but with the object and purpose all the time of varying a written contract by a verbal understanding between the parties, had at the time of its execution. The offers of this testimony will be found in the case folios 94, 95, 96, 98, 99, 100-1-2-3, and are in the following words:

"Counsel for Defendants offer to prove by parol that on or about the 20th day of March, 1857, the Plaintiffs and Defendants met at St. Anthony for the purpose of attempting to compromise certain differences and controversies which then existed between them, growing out of and connected with the manufacture of lumber at the Saint Anthony mills, under a certain agreement and supplement, executed prior to that time, and that they did at that time agree upon a basis of compromise which was as follows: That the whole of the differences existing between them should be submitted to three arbitrators, the award of whom, or a majority of whom should be final. That a new contract should be entered into for the manufacture of lumber between Plaintiffs and Defendants, and that the arbitrators should take into consideration, in assessing their damages, the whole period for which the original and supplemental agreements had to run, that is to say, to allow damages prospectively, as well as retrospectively. That afterwards, on the 31st day of March, the contract in evidence and the articles of submission of the differences and controversies between the Plaintiffs and Defendants were executed at the same time, by the same parties, and as a part of the same transaction, in pursuance of the terms and basis of compromise previously agreed upon. That the submission failed by reason of the disagreement of the arbitrators on or about August 25th, 1857.

"The above evidence is offered for the purpose of showing that after the 2d day of September the contract set out in the complaint was no longer of any binding force between the parties thereto. The above evidence was objected to by the counsel for the Plaintiffs; the objection sustained by the Court, whereupon the counsel for the Defendents excepted.

"Counsel for the Defendants then offered in evidence the submission papers referred to in the answer, which was ob-

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jected to by the Plaintiffs' counsel as immaterial. The objection was sustained by the Court, and exceptions thereunto taken by counsel for the Defendants.

"The Defendants then offered to prove that certain differences and controversies existed between the Plaintiffs and Defendants in the early part of 1857, connected with and growing out of a certain agreement dated September 2d, 1854, and a supplemental agreement dated April 30th, 1856, respecting the manufacture of lumber at the Saint Anthony mills. That on or about the 20th day of March, 1857, the parties met for the purpose of adjusting and compromising said controversies and differences, when the following terms were agreed upon, as a basis of compromise, viz.:

"That the whole of the matters in difference between the parties should be submitted to these arbitrators, the award of whom, or any two of whom, should be final and conclusive between the parties.

"That a new contract should be entered into for the manufacture of lumber at said mills between said parties, and that the arbitrators should, in assessing the damages, give prospective damages during the whole term which said agreement had to run, to-wit: till May 15th, 1860, as well as retrospective damages. And that if the arbitrators failed to make an award, then the said contract should be determined and ended, and the parties thereto reinstated in all their rights as they existed at the date of agreeing upon the terms of said compromise, but if an award was made, then said contract to remain operative till May 15th, 1860.

"That the arbitrators subsequently met and heard the allegations and proofs of the respective parties, when, on or about the 25th day of August, 1857, they failed to make an award in consequence of disagreement, and notified the parties thereof.

"The above evidence was objected to by Plaintiffs' counsel, upon the ground that it was irrelevant and immaterial, or else that the effect of the evidence would be to vary the terms of a written contract. The objection was sustained by the Court, and exception to the ruling taken by counsel for the Defendants.

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"The Defendants then offered to prove that the contract specified in the complaint was a part of a compromise and plan of settlement entered into by the parties thereto, to adjust and settle difficulties then existing between them as set up in Defendants' amended answer. That by the terms of said compromise it was expressly agreed by and between the respective parties thereto, that said contract should only continue in force in case the whole of said plan of compromise should be carried out by a final award, and should determine and cease to be operative upon a failure of the arbitrators to make an award; that through mistake and misapprehension this portion of said agreement was not incorporated in said contract, whereas it should have been, in order to fully express the actual agreement made between said parties. Wherefore the Defendants pray the reformation and correction of said contract in accordance with such actual agreement, and ask leave of the Court so to amend their said answer as to allow such proof and reformation of said contract. The counsel for Plaintiffs objected.

"Offer and leave to reform and amend declined by the Court, to which ruling counsel for Defendants excepted.

"The Court declined to grant permission to amend, and exception thereto was taken by counsel.

"Defendants then offer to show that the submission of the existing difficulties between Plaintiffs and Defendants, in March, 1857, was the consideration for making and entering into the contract set out in the complaint, dated March 30, 1857.

"The above proposition was objected to by counsel for the Plaintiffs as immaterial. The objection was sustained by the Court, and exception taken by Defendants' counsel to the ruling."

That the testimony thus offered was properly excluded cannot admit of any question in our judgment. It was nothing more nor less than an offer of agreements and understandings between the parties had at the time the contract was entered into, to terminate it contrary to its own stipulations.

That all understandings or agreements had between parties

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prior to or cotemporaneous with the execution of a written contract relating thereto, are merged in the writing, and cannot be given in evidence to alter, vary, or affect the written contract, is a principle too familiar to justify the citation of authorities. That the time a contract has to run, or within which it is to be performed, is an element that can no more be changed or varied by any such verbal understandings or agreements than any other part of the writing, is settled by an unbroken current of authorities. *Phil. Ev., Cowan & Hills and Edward's Notes, vol.* 2, *page* 665, *note* 494; *Trustees, &c., vs. Stetson*, 5 *Pick.*, 506; *Woodbridge vs. Spooner*, 1 *Chitty's R.*, 661; *Cunningham vs. Wardell*, 3 *Fairfield* (*Maine*) 466; *Dow vs. Tuttle*, 4 *Mass.*, 414; *Fitzhugh vs. Runyon*, 8 *Johns.*, 375; *Mosley vs. Hanford*, 10 *Barn. & Cress.*, 729; *Foster vs. Jolly*, 1 *C. M. & R.*, 703; *Adams vs. Wardley*, 1 *M. & W.*, 378; *Bradley vs. Anderson*, 5 *Vt.*, 152; *Fleury vs. Roget*, 5 *Sandf.*, 646; 8 *Johns.*, 375; 5 *Vt.*, 152; 17 *Pick.*, 174; *Downs vs. Webster*, *Braytt. R.*, 79; *Thompson vs Ketchum*, 8 *Johns.*, 189; *Campbell vs. Hodgson*, *Cow.*, 74; *Wesson vs. Carroll*, 1 *Ala. R.*, 251; *Philips vs. Keener*, 1 *Litt. R.*, 329; *George vs. Harris*, 4 *N. H. R.*, 533; *Atkinson vs. Scott*, 1 *Bay*, 307; *Hamilton vs. Wagner*, 2 *Marsh. Ky.*, 331; *Bond vs. Haas*, 2 *Dall. Pa.*, 133; *Morris vs. Edwards*, 1 *Ohio*, 189; *Ib.*, 178; *Bingham vs. Rogers*, 17 *Mass.*, 571; *Austin vs. Sawyer*, 9 *Cow.*, 39; *Spencer vs. Tilden*, 5 *Cow.*, 144; *Paterson vs. Hull*, 9 *Cow.*, 747; 5 *Mass.*, 411; 16 *Pick.*, 231; *Warren vs. Wheeler*, 8 *Metcalf*, 97; *Dr. Long vs. Stanton*, 9 *Johnson*, 38; 1 *Cow.*, 249.

It is true that where different instruments are executed between the same parties at the same time, *all relating to the same subject matter*, they are to be considered together as constituting but one transaction. But in the present case, the submission papers, and the contract sued upon, have no connection whatever. *They do not relate to the same subject matter.* They are just as separate and distinct and independent of each other as can be. There is no reference, connection or allusion in the one to the other.

But even if considered together, there is nothing to be found in either, or in any other instrument, executed between

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the same parties or any other parties, at that or any other time, indicating that upon any such contingency as is alleged, or any other contingency, the contract sued upon was to terminate sooner than the 15th of May, A. D., 1860.

Independent of all writings, the Defendants are endeavoring to vary the terms of the written instrument by parol understandings alleged to have existed at and before the time the contract was executed, which is against all authority.

The proposition to amend the answer as asked for, was addressed to the discretion of the Court, and the refusal of the Court to allow the amendment is not subject to review by this Court. 6 *Barb. S. C. R.*, 308; 12 *Barb. S. C. R.*, 215; 5 *Sandf.* 225; 4 *Denio*, 193; 20 *N. Y.*, 81.

But even if it was, the Court was correct in its refusal to allow the amendment. The Defendants had twice amended their answer, the last time at the commencement of the trial. This was a proposition to amend for the third time, and that too in a material respect, in the midst of the trial, and it would have been an improper exercise of the discretionary power of the Court to have allowed the amendment, as is clear by all the authorities upon the subject. Furthermore, if the answer had contained an allegation as proposed by the amendment, it would not have been sufficient to let in the evidence.

An allegation "that through mistake and misapprehension," certain portions of a contract had been left out in reducing it to writing, is not sufficiently definite and specific to allow the introduction of evidence.

As the matter relative to the proposed amendment, however, cannot be reviewed by this Court, it would be improper further to discuss the subject or to cite authorities.

If it would not be traveling too far out of the case, however, we would remark that the facts clearly show that it was utterly impossible that there should have been any such understanding as is alleged, that the contract was to terminate on the 1st of September, A. D., 1857, upon the contingency claimed. Look at the matter for a moment. There had been previous dealings between the parties, and they had become involved in difficulties which they were trying then to settle by arbitration. Each party had lost confidence in the other.

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Nothing but self-interest and the necessity of the case induced them to enter into a new contract. The Plaintiffs had mills which they wished to operate, and the Defendants had logs which they wished sawed. Self-interest impelled them to come to an arrangement by which one party could get the profits of running the mills, and the other of the manufactured lumber. But, as they were not on friendly terms, and each distrusted the honesty of the other, they would naturally make a new contract exceedingly specific and definite as to the rights and liabilities of the respective parties. The contract, as executed, bears upon its face evidence of great care and caution in drawing it up. It seems that the parties were over a month in getting up this contract. It is remarkable for its particularity and specificness in every respect. It is impossible, therefore, that there could have been an understanding between the parties, under the circumstances, that the contract was to terminate upon any contingency, on the first day of September, A. D., 1857, and so important a provision not be expressed definitely in the writing. The allegation of "mistake and misapprehension," and the offer to amend, was one of those desperate propositions which counsel sometimes resort to when a case is hanging heavily against them.

V.—"Defendants then offered to show the agreement and supplement set forth in the answer, to be followed up by showing breaches and damages.

"Objected to by Plaintiffs' counsel, on the grounds:

"1st. That it never was executed by the parties recited, nor binding upon any of the parties thereto.

"2d. If it ever was an agreement, it was not an agreement between the parties in this suit.

"3d. If it ever was an agreement, it formed a copartnership between the parties thereto.

"4th. That the evidence is immaterial and irrelevant.

"5th. That it would not constitute a counter-claim, set-off, or any legal defence in the action.

"6th. That the parties to said agreement and supplement are not the same parties as to this action."

Objection sustained by the Court, and exceptions taken by counsel for Defendants. *Folio 97 of case.*

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The Defendants afterwards offered in evidence the same writing, dated September 2d, A. D., 1854, and the supplement set forth in the answer, without any proposition to follow them up with any other evidence, which evidence was objected to and excluded by the Court. *See folios of case* 102 *and* 103.

The Court was correct in rejecting this evidence:

1st. Because the paper called a contract, dated September 2d, 1854, which is offered in evidence, is not a contract binding upon any one, it never having been executed by the parties to be bound by it. It appears to have been intended as a contract between Lovejoy & Brockway, and John L. Lovejoy, and Dorilus Morrison, for and on account of himself, Daniel W. Bradley, Graham L. Boynton, and Washburn & Woodman. But it was never executed by or on behalf of Bradley or Boynton, and, until executed by all who were to be bound by it, it was, of course, binding upon none. And the existence of such a contract is in issue if material. Furthermore, it purports to be an instrument under seal, and the firm name of Lovejoy & Brockway is signed by J. L. Lovejoy, who was not even a member of that firm, as the answer alleges, and it is not alleged, and does not appear, that he had authority thus to sign their name, much less that any such authority was under seal. So, too, the firm name of Washburn & Woodman is signed, but by whom is not alleged and does not appear. If by one of that firm, then he alone is bound, and if by a stranger, then neither is bound, unless due authority is first alleged and shown. Clearly, then, upon the face of the instrument, it appears never to have been executed, so as to make it a contract between anybody, unless it was a contract between the plaintiffs and Morrison only, which view of the matter will be hereafter noticed.

2d. Even if it was a contract, it was not between the same parties as this suit, and its existence, or breaches of it, is is wholly immaterial in this action.

3d. If it was a binding contract, it was a partnership between the parties to it.

It appears from the instrument that some of the contemplated parties to it had saw-mills with facilities for manufacturing lumber, while others had logs to be sawed, and it was pro-

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posed to use these facilities for manufacturing these logs into lumber for the joint benefit and profit of the parties concerned. From the proceeds the parties furnishing the logs were to have eight dollars per thousand feet, and five per cent. commission for selling the lumber, and the parties manufacturing were to have four dollars per thousand, besides expenses paid for piling, handling, &c., and any further sum realized was to be divided equally between them, to the extent of two dollars per thousand feet, beyond which sum the profits were to go exclusively to one party, and in case of loss it was to be sustained in the same proportion. The slabs, edgings, &c., were to be the joint property of all. This constituted a partnership.

Now upon what ground can it be claimed that these copartnership articles between different persons than the parties to this suit, and which appear never in fact to have been executed, should have been received in evidence? We submit that the Lecompton Constitution would have been just as relevant and material.

The supplement offered in connection with it was not executed by the necessary parties, according to its own terms, to give it any validity.

Clearly, then, the offer of these writings in evidence, in whatever light they may be viewed, in connection with the proposition to "follow up" by showing breaches and damages, was properly denied by the Court. They have no connection or relation to this action, or the matter in suit.

VI. After the offer and rejection of the alleged contract, set forth in the answer, dated September 2d, 1854, the Defendants introduced a large number of witnesses, whose testimony is set forth in the case, and then made the following other offers of evidence. [See folios of the case, 154 to 161.]

"The Defendants offer to show that Dorilus Morrison, C. C. Washburne, and Cyrus Woodman, were the original parties in interest of the first part, under the agreement of September 2d, 1854. That on or about the 15th day of March, 1855, Cyrus Woodman sold, transferred and assigned all his rights and interests under said contract, to the Defendant, C. C. Washburne, and that from the date last named, until April

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1st, 1856, Dorilus Morrison and C. C. Washburne have constituted the firm of D. Morrison & Co., and were the only parties in interest on the one part under said last named agreement. That on or about the 11th day of October 1855, Elihu B. Washburne, one of the Defendants in this action, purchased from C. C. Washburne and D. Morrison an interest in the business of D. Morrison & Co., under the aforesaid contract, to commence on the 1st day of April, 1856, and that since April 1st, 1856, the firm of D. Morrison & Co., consisted of Dorilus Morrison, C. C. Washburne, and E. B. Washburne, the Defendants in this action, and that they have had transferred to them in manner aforesaid, all the rights of the parties of the first part, under the contract of Sept. 2d, 1854. That between the 15th day of May, 1855, and April 1st, 1856, the plaintiffs violated the agreement of Sept. 2d, 1854, and that they did not manufacture the lumber in a merchantable manner, but unevenly and defectively. That they did not manufacture said lumber with proper economy, as required by said agreement, in that they did not saw logs into the kinds of lumber they should have done, but sawed logs that should have been manufactured into clear and higher priced lumber, into common and dimension stuff, which was of less price. That they did not run said mills at all times, as required to do by said contract, and sawed less lumber than they should have done during said period."

To which the counsel for the Plaintiffs objected, and the objection sustained by the Court, and exceptions taken by counsel for Defendants. Whereupon,

"Defendents renewed their offer last made, coupled with an offer to show the following additional facts, to wit: that the Plaintiffs knew and assented to this transfer from Woodman to C. C. Washburne, and also to the change in the firm of D. Morrison & Co., by E. B. Washburne becoming one of the parties and members of that firm, and also that these Defendants, in the transfer to them of all the rights of the parties of the first part under the contract of Sept. 2d, 1854, assumed all the liabilities growing out of said contract of the said parties of the first part thereto, all of which was done with the knowledge and assent of the said Plaintiffs in this

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action, who have ever since treated and recognized these Defendants as the sole parties in interest thereto."

Which was also objected to by counsel for Plaintiffs, and objection sustained by the Court, to which counsel for the Defendants excepted. Whereupon,

"Defendants offered to show that from and after the 30th April, 1856, Dorilus Morrison, C. C. Washburne, and Elihu B. Washburne constituted the firm of D. Morrison & Co. That they were the only parties in interest under the agreement of Sept. 2d, 1854, and the supplement thereto of April 30, 1856, from and after said 31st day of March, 1856, and that they were recognized by the Plaintiffs during the years 1856 and 1857, as the parties under said agreement and supplemental agreement, and treated by them as the parties under said agreement and supplement in all things. That from April 30th, 1856, during the time said Plaintiffs continued to manufacture lumber under said agreement and supplement, they violated the terms of said agreement and supplement, in that they did not saw the lumber in a merchantable and economical manner, but sawed the same in an unmerchantable manner and unworkmanlike manner, and not with proper economy, whereby defendants were greatly damaged."

Which was also objected to by counsel for plaintiffs, and objection sustained by Court, to which the counsel for the Defendents excepted.

These propositions may be considered together.

The relevancy and materiality of the testimony offered depends wholly upon the nature and terms of the contract referred to in the offer, as dated Sept. 2d, 1854, and it is a sufficient reason for rejecting the evidence, that the contract thus referred to was not made a part of the offer, or otherwise identified, so as to enable the Court to see any relevancy or materiality of the testimony proposed.

The offer was made independent of the agreement to which it referred. It speaks of an agreement "of Sept. 2d, 1854," without any other description of it. No such agreement was in evidence, and there was nothing sufficient to indicate what agreement was referred to, or that any such was in existence,

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or, if so, what its terms were, or who were the parties to it. The Court could not infer that the agreement referred to in the offer was the one previously offered in evidence and rejected, or that it was any particular agreement of that date, or if it could so infer it would not help the matter, inasmuch as no agreement was offered or presented in connection with the offer, and the Court had to pass upon the question of admitting the testimony in the shape the offer was made. The Court could not do otherwise than reject this evidence as offered.

But suppose, for argument, that the alleged contract set forth in the answer, (which is probably the one referred to,) had been offered in connection with the testimony proposed, the evidence would have been inadmissible upon a variety of grounds. In the first place, the existence of this alleged agreement of Sept. 2d, 1854, is to be treated as denied, and if produced, its execution should have been proved before it could have been received in evidence or considered by the Court under any circumstances. And, then, all the objections urged under the foregoing head against the admissibility of this alleged contract and supplement again rise in full force.

First.—It was never executed by all the parties, and therefore not a completed contract, and hence in no way a binding instrument upon anybody.

Second.—The parties to this alleged contract of Sept. 2d, 1854, are not the same as the parties to this suit, even if it was a binding instrument between anybody.

Third.—If it is a binding agreement, it creates a partnership between the parties to it, and conceding it to be between the same persons as the parties to this action, and that the Plaintiffs are liable thereon, such liability cannot be set up as a counter-claim by the Defendants in this action. In an action by A *vs.* B to recover money, B cannot set up as a counter-claim an alleged balance due to him from A in a former partnership transaction between them. *Ives vs. Miller*, 19 *Barb., S. C. R.* 196.

Fourth.—The evidence proposed to be offered is, in some respects, at variance with the contract set out in the answer; and in other respects it is inadmissible on the ground of there

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being no averments in the answer under which it can be received.

Fifth.—Another, and as we think, a further conclusive objection to the testimony offered, is this. If this agreement of Sept. 2d, 1854, is a binding instrument so as to become the foundation of an action or counter-claim, then the Plaintiffs, instead of having broken it, set up and claim that it was broken and violated by the Defendants or other parties under whom the Defendants claim, and that they are entitled to recover heavy damages on account of such breach; which view of the matter may be taken as showing that the testimony offered does not constitute a legitimate counter-claim, and which facts must also be considered as set up in the reply, as denying or avoiding the allegations in the amended answer. Now the Court will see that the Plaintiffs could not recover their damages for the breach of that contract in this action, for it would be a matter entirely foreign to the cause of action set forth in the complaint; and to litigate the rights of the parties under this contract of September 2d, 1854, to the extent of showing that the Defendents have no claim against the Plaintiffs equal to the claim of the Plaintiffs against the Defendants under it, (which would be all the Plaintiffs would do in this action,) would be a complete bar to any future action the plaintiffs might bring to recover their damages.

Where a breach of contract is alleged, and damages therefor claimed by each party respectively against the other, it strikes us as absurd, as we urged upon the Court below, that in an action by one against the other upon another cause of action, in no way connected with the contract, the Defendants can set up by way of counter-claim, the alleged breach by Plaintiffs, and damages, when it is manifest that the Plaintiff cannot be permitted to establish and enforce his rights under the contract as claimed by him. In this view of the matter alone, we submit, that the Court below was unquestionably right in rejecting the testimony offered.

VII.—The next exception found in the record, occurs in connection with the charge of the Court to the jury. The counsel for the Defendants requested the Court to instruct the jury:

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First,—"That the measure of damages in this action for the alleged breach of the contract on the part of the Defendants, is the value of that contract at the date of the breach, the rent of the mills while they remained unemployed in the hands of the Plaintiffs, the value of Plaintiffs' services so long as they were obliged to remain unemployed by reason of such breach, and any expenses which they may have incurred directly resulting therefrom." That the said Court declined and refused so to charge in the language requested, but did charge as hereinafter stated. To which said refusal the Defendants excepted. The said Defendants' counsel also requested the Court to charge:

Second,—"That the probable profits which the Plaintiffs might have realized by the manufacture of lumber under the contract from the second day of September, 1857, until the first day of September, 1858, are too uncertain and dependent upon too many contingencies to form a rule of damages in actions of this character." Which instructions the Court declined to give, to which refusal counsel for Defendants excepted.

But as to the matter of damages, the Court charged among other things: "That the measure of damages in this action for the alleged breach of contract on the part of the Defendants, is the benefits or profits which the Plaintiffs would have received from the actual performance of such contract, from the second day of September, 1857, until the first day of September, 1858, but in fixing the damages to be allowed, the jury are not to take into consideration the unusual favorable character of the fall of 1857, or the spring of 1858, or any advantages on account of circumstances subsequent to the breach of said contract." To which portion of the charge the counsel for the Defendants excepted.

And the Court further charged upon the matter of damages, at the request of Plaintiffs' counsel as follows: "If the Defendants refused to furnish logs for the Plaintiffs to saw as agreed in the contract, it was a breach on their part, and the Plaintiffs are entitled to recover as damages therefor, the difference between what they were to get on what they could have sawed for Defendants pursuant to the contract during

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the first year after the alleged breach, and the cost of sawing the same." To which portion of the charge counsel for the Defendants then and there excepted.

"And the Court further charged at the request of the Defendants that the jury, in estimating the Plaintiffs' damages upon the rule as laid down by the Court, must take into consideration as a part of the cost of manufacturing said lumber, the value of the labor of the men employed in and about said business, the cost of repairs, and all other expenses incident to the manufacture of lumber at these mills. Also that in estimating the probable profits, the jury must take into consideration the per centage of risks by reason of all casualties incident to the mills on account of the elements, low water and accidents of every description that would affect the capacity of said mills. And also must take into consideration the fact that the Defendants were not amenable to damages on account of not furnishing logs to said plaintiffs, when prevented by Providential acts, such as low water, floods, &c."

The refusal of the Court to charge the jury, as above requested by counsel for the Defendants, and the correctness of the charge as above given, simply involves the same question that was raised by Defendants' counsel in objecting to the testimony offered by Plaintiffs to show their damages by reason of the breach of the contract, and which we have hereinbefore considered under the third head. We have therefore only to refer the Court to what we have there said and the authorities there cited. The charge of the Court in this respect corresponds with the rule of damages as determined upon in the introduction of the testimony.

The counsel for the Defendants also further requested the Court to instruct the jury—

Third,—"That if the jury finds that the Defendants suffered damages by reason of the want of economy and improper manner in which Plaintiffs manufactured their lumber in 1857, the presumption is that they would have continued to manufacture in the same manner as long as they run said mills. And in estimating damages against the Defendants, for the alleged breach of contract, the jury must take into consideration the damages which it is presumed the Defend-

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ants would have continued to suffer had Plaintiffs continued to saw."

Which request the Court declined to grant, and Defendants' counsel excepted.

The counsel for the Defendants will not of course urge upon this Court that there was any error in refusing this third request. It needs no argument.

The Court was further requested to instruct the jury by Defendants' counsel—

Fourth.—"That if the jury find that the Plaintiffs were not manufacturing said lumber in a proper manner, and with prudence and economy, so far as the mills would cut, and the logs would make the same, then the Defendants were absolved and released from furnishing to Plaintiffs any more logs under said contract."

Which the Court declined to give in the language requested, but did charge as follows:

"That if the Plaintiffs were not manufacturing said lumber in a proper manner, with prudence and economy, so far as the mills would cut and the logs would make the same, and if the Defendants objected to the said faulty manufacture, and the Plaintiffs thereafter either neglected or refused to manufacture the same in a proper manner and with prudence and economy, then the Defendants were absolved and released from furnishing to Plaintiffs any more logs under said contract. But if the jury finds that the Defendants, knowing the manner in which said lumber was manufactured, accepted the same without objection, and assigned another and different reason for refusing further to furnish logs under said contract, then, and under those circumstances, even if the lumber was not properly manufactured, that fact would not absolve or release the Defendants from performing their part of the contract."

To which counsel for the Defendants excepted.

There can be no doubt as to the correctness of the law as above held and laid down by the Court. The authorities are to the point and uniform. *Wilkins vs. Stevens*, 8 *Vt.*, 214; 25 *Wend.*, 665; 26 *Vt.*, 87.

The counsel for the Defendants further requested the Court to instruct the jury—

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Fifth.—"That the Plaintiffs cannot recover damages in this action, by reason of the alleged breach of contract on the part of Defendants in not furnishing logs after September 2, 1857, because they have neither averred nor proved a present or continuing readiness and ability to perform said contract on their part."

Which request the Court declined to grant, and counsel for Defendants excepted.

Counsel for the Defendants further requested the Court to charge—

Sixth—"That even had Plaintiffs averred and proved a present readiness, having rendered the possession of the mills to the owners on or about the 12th day of December, 1857, they cannot recover damages on account of the alleged breach by the Defendants after that date."

Which request was refused by the Court, and counsel for the Defendants excepted.

These requests are only again raising the question which was urged by counsel for the Defendants, against the admissibility of evidence offered by Plaintiffs, and which we have hereinbefore considered under the *second* head. The authorities which we have before cited conclusively show that the action may be brought immediately upon the breach, and that it is not necessary to remain in readiness until the expiration of the time the contract had to run. *Durkee vs. Mott.*, 8 *Barb.*, 426; 2 *Denio*, 609.

Counsel for the Defendants next requested the Court to instruct the jury—

Seventh and Eighth.—"That if the Plaintiffs' damages are to be measured by the probable profits which they might have realized in the manufacture of lumber under this contract, from September 2, 1857, till September 1, 1858, then in estimating these profits the jury must take into consideration, as part of the cost of the manufacturing said lumber, the rent of these mills, and value of Plaintiffs' services, during said period, as a part of the cost of manufacturing said lumber."

Which request the Court declined to grant, but did instruct the jury as follows:

"That if between the 2d day of September, 1857, and the

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1st day of September, 1858, the Plaintiffs, or either of them, were engaged in any business from which they realized any gain or profit, or in which their services were of any value to them, then the jury must take into consideration such value of the Plaintiffs' services during that period as part of the cost of manufacturing said lumber." And "That the re-entry of the lessors under the lease to Plaintiffs, in December, 1857, did not absolve them from the payment of rent beyond the date of such re-entry."

To which refusals to charges requested, and to the instruction as given, counsel for the Defendants excepted.

There was no error of the Court in refusing to instruct the jury as above requested, or in the instructions as given.

Counsel for the Defendants further requested the Court to instruct the jury—

Ninth.—That under the pleadings in this action, it stands admitted that Plaintiffs were not bound to saw any logs for Defendants under any contract since February 3d, 1857, and such being the case, there being no mutuality of obligation, the Defendants were not bound to supply Plaintiffs with logs. And—

Tenth.—"That the re-entry by the lessors under the lease to the Plaintiffs in December, 1857, absolved the Plaintiffs from payment of any rent beyond the date of such re-entry."

Which request the Court refused and the counsel for the Defendants excepted.

We see no grounds upon which it could be expected that the above ninth request would be complied with. The tenth request was also properly refused, because there was no allegation in the answer or issue in the case making it material. And furthermore, it is true in point of fact, even as between the Plaintiffs and the Water Power Company, (the Plaintiffs' lessors,) for by an express provision in the lease the Plaintiffs are not to be absolved from the rent by a re-entry by the lessors.

The Court further instructed the jury among other things as follows:

"If the Defendants Morrison & Co., knowing the manner in which the lumber was manufactured, accepted and received

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it from the Plaintiffs, without finding fault, and as a compliance with the contract on the part of the Plaintiffs in respect to its manufacture, the Defendants are precluded from now saying it was not well manufactured." To which counsel for the Defendants excepted.

There can be no question as to the correctness of the law as above given to the jury by the Court, as we have before shown by the authorities cited in commenting upon the fourth request of Defendants' counsel to the Court to charge the jury, and the charge as there given.

F. R. E. Cornell, with Bigelow & Cooper, Counsel for Appellants.

Smith & Gilman, Counsel for Respondents.

By the Court—Emmett, C. J.—The complaint sets out in full, a contract under seal, dated March 31, 1857, between the Plaintiffs as parties of the first part and Defendants as parties of the second part, whereby the Plaintiffs agree to run, operate and use for manufacturing lumber, exclusively for the Defendants, certain mills situated at St. Anthony, from the date of the contract until the 15th day of May, A. D. 1860. And the Defendants thereby agreed to furnish a sufficient quantity of logs to keep said mills in full operation during said period, and to pay to the Plaintiffs at the rate of five dollars per thousand feet, for sawing pine lumber, and seven dollars per thousand for hard wood. The Defendants were also to have the use of a lathe and a shingle machine, connected with the mills, and certain water power for which they were to pay a stipulated rent. They were also to take, if they elected so to do, certain logs which the Plaintiffs then had, at a price agreed upon.

The action is brought to recover an alleged balance due from the Defendants to the Plaintiffs for rent, logs furnished, and manufacturing done under said contract, and also damages alleged to have accrued by reason of the Defendants refusing, on and after a certain date, to furnish logs to keep said mills in operation.

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The Plaintiffs allege a full compliance on their part, and that they continued to manufacture up to the 2d day of September, 1857, at which time the Defendants refused further to supply the mills as provided by the contract. They claim a balance due them at that time for sawing or manufacturing, and for rent of the lathe and shingle machine, and logs furnished under the contract, of $10,000. And also that they have sustained damages, in the sum of $101,531, accruing to them between the said 2d day of September, 1857, and the 1st day of September, 1858, by reason of the Defendants refusing to furnish logs for the mills to manufacture after September 2, 1857.

The Defendants admit the making of the contract, but deny that there is anything due the Plaintiffs for rents, logs, or manufacturing as alleged. They also allege that by an understanding and agreement between the parties, had and made prior to and contemporaneous with the making of the agreement set forth in the complaint, the said agreement was connected with and based and dependent for its continuance, upon certain articles of submission to arbitration, executed by the parties at the same time, by which all matters of difference existing between the parties and arising out of a prior contract, were submitted to arbitrators for settlement. That the contract mentioned in the complaint was but one part of the general plan of compromise, and was to cease and become inoperative, in the event that the arbitration failed; and that the arbitrators under said submission having failed to agree, they, the Defendants, were absolved from the operations of the contract sued upon.

The Defendants set forth the contract upon which the submission to arbitration arose; allege various breaches thereof by the Plaintiffs, and the damages sustained thereby, and set it up as a counterclaim against the demands of the Plaintiffs.

They further aver sundry breaches, on the part of the Plaintiffs, of the contract sued upon, and allege certain damages therefrom, which they also set up as a counterclaim to the Plaintiffs' demands.

The action was tried by a jury. The Plaintiffs obtained a verdict in their favor. The Defendants made a motion for a

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new trial upon a case prepared and settled as provided by statute; which motion being overruled, the case is brought to this Court by an appeal from the order denying a new trial.

The Appellants have deemed it necessary to raise each of the points made in the record separately, and for this reason perhaps, an unusually large number is presented, but, as very many of them refer to the same general questions or propositions, we do not think it essential that the various points should be considered in detail. We shall therefore confine ourselves to the general questions involved, or to such of them as appear to us material to the decision to which we have come.

The Defendants first allege that the Court erred in admitting Haus and excluding Huy from the panel of jurors.

Both were challenged by the Defendants for actual bias. In the case of Haus, the question of bias was by consent submitted to the Court and upon trial the challenge was found to be untrue. We consider this finding as conclusive under the statute; but even if it were not, we see nothing in the facts elicited upon the examination of the juror, showing actual bias.

In regard to the exclusion of Huy, the Defendants' challenge was admitted by the Plaintiffs, and there was therefore nothing to try. We think the Court very properly refused the Defendants permission to examine the proposed juror, while the challenge remained, and the facts upon which it was grounded were not denied. It is only when the facts are denied that the statute provides for a trial. *Comp. Stat.*, 775, *section* 28.

The Defendants however asked leave to withdraw the challenge. But this the judge refused to grant, and this refusal is alleged as error. We regard the application to withdraw the challenge as addressed to the discretion of the judge, and his action thereon cannot be reviewed in a superior Court, without express authority therefor given by statute, which authority we are unable to find.

We are aware that it has been asserted, that if a Court arbitrarily and without any sufficient reason set aside a juror properly selected, it will be ground for error. *Hine vs. The*

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State, 8 *Humph.*, 597, (*cited in* 2 *Gra. on New Trials*, 194.) But that evidently was on the ground of a gross abuse of discretion, which is far from being true of this case. On the other hand Judge Story, in a case where on trial for murder two jurors, members of the Society of Friends, were set aside upon a mere suggestion of the fact, without examination as to their belief in regard to capital punishment, refused to set aside the verdict, and said that "even if a juror has been set aside for an insufficient cause, I do not know that it is matter of error, if the trial has been by a jury duly sworn and empannelled and above all exception. Neither the prisoner nor the government in such a case have suffered any injury." 2 *Mason*, 91. We think the doctrine and reasoning of Judge Story apply with peculiar force to the case at bar; for here too there has been a trial by a jury duly sworn and empannelled, and so far as we are advised above all exception.

There are other points made by the Defendants for the purpose of showing that the Court erred in refusing to permit them to prove by parol, according to their several offers, the understandings and agreements of the parties at and prior to the execution of the contract on which action is brought. These different offers are in substance identical, though varying somewhat in form. They were directed to certain allegations of the answer and avowedly for the purpose of showing that the contract sued upon was to terminate in a certain contingency, before the period fixed by the contract itself, and that such contingency had happened before the breach complained of. It is however unnecessary to recapitulate them here, nor do we propose to discuss the several points and exceptions made to the rulings of the Court on the questions here involved, nor to review the mass of authorities to which we have been referred, because the view which we have taken on other points renders such a course unnecessary. Suffice it that in our opinion these several offers, however varied in form, were simply attempts to vary by parol the terms of the written contract, of which that concerning the time the contract was to continue was amongst the most material; and that all such evidence was properly excluded. And as to the offer of the Defendants to so amend their answer as to avoid

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the objection above named, and to show that what they offered to prove was omitted in writing the contract, through mistake and misapprehension, and their prayer for leave to reform and correct the contract in that respect; we think that the refusal of the judge to permit such amendment and reformation affords no ground for reversal. The application was addressed to his discretion, and there is no just ground for claiming that, in the decision which he made, this discretion was abused.

We are unable also to discover error in the Court refusing to receive in evidence the submission papers referred to in the Defendants' answer. They do not appear to us to refer to the same subject matter as the contract sued upon, though executed the same day, or at the same time. There is no reference in the one to the other. The one relates to a settlement of difficulties existing between the parties, growing out of their transactions under a former contract; the other relates wholly to matters subsequent. The arrangement was quite natural. Differences had arisen between the parties as to their respective rights and liabilities under a prior contract, and they submit those differences to arbitrators, making an entirely new contract as to the future. The new contract does not by its terms, depend in the least degree upon the success or failure of the arbitration, nor is there any necessary connection between them. Each seems distinct and perfect in itself. And if the arbitration fails and the submission papers do not afford a remedy, the parties respectively have their remedy on the agreement to which the arbitration referred.

During the trial the Defendants further offered in evidence, the prior agreement set up in the answer, dated Sept. 2, 1854, and the supplement thereto, and proposed to follow them up by proof of breaches on the part of the Plaintiffs and of the damages which the Defendants sustained thereby; but upon the Plaintiffs objecting thereto, the Court sustained the objection. They then offered in evidence said agreement and supplement, without any evidence of breaches or damages, but with no better success. And it is now urged that the Court erred in excluding such evidence.

The object of these several offers, was, doubtless, to estab-

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lish the counter-claim set up in the answer; and whether the Court was right in rejecting the evidence may be determined by the sufficiency of the counter-claim as alleged.

It will not be seriously contended that the facts stated in the answer would constitute a valid set-off or counter-claim under the practice as it formerly stood; and if they are sufficient now, it is by virtue of the statute alone. The statute authorizes the defendant to set up a counter-claim by way of defence, and defines the nature of such counter-claim to be one existing in favor of the Defendant and against the Plaintiff, between whom a separate judgment might be had in the action, and must arise out of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the Plaintiff's claim, or connected with the subject of the action.

2. In an action arising on obligation, any other cause of action also arising on obligation, and existing at the commencement of the suit. *Comp. Stat.* 541, *sec.* 71.

The first clause covers those cases which would have formerly fallen under the head of recoupment, and to some extent enlarges the operation of that class of cross claims. The Defendants' claim in this action arising under a contract entirely distinct from that upon which the Plaintiffs' claim is founded, and not being connected with the subject of the Plaintiffs' action, could not be brought in under the first clause.

The second clause, however, is, in our judgment, broad enough to cover the counter-claim set up by the Defendants. The word "obligation" as used in the statute, means contract, and comprehends all causes of action arising *ex contractu*, as distinguished from causes of action arising *ex delicto*. Any other construction would be at variance with the purpose of the code, which, throughout its entire scope and spirit, is aimed at the consolidation instead of dispersion of actions. It blends the Courts of Law and Equity, and permits, even enjoins the litigation and settlement of all equities existing between parties to an action, in one suit, which formerly could be only enforced by way of cross action or cross bill. *Comp. Stat. p.* 481. *secs.* 23-4. It permits but one form of action for the settlement of all claims of a private nature.

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Comp. Stat. p. 532, *sec.* 1; *p.* 480, *secs.* 19-20. This affords every reason to believe that it was not intended to restrict the number and character of claims that might be litigated in one action by the use of the word "obligation" in describing counter-claims. It is a term open to several interpretations. In its general and most extensive sense it is synonymous with duty. In a more technical meaning, it is a tie which binds us to pay or to do something agreeably to the laws and customs of the country in which the obligation is made. It also signifies the instrument or writing by which the contract is witnessed. It is also defined to be a deed whereby a man binds himself under a penalty to do a thing; and the word in its most technical signification, *ex vi termini*, imports a sealed instrument. *Bouvier's Law Dic. Vol.* 2., *Obligation.* It is needless to say that a much more appropriate word might have been selected to convey the intention of the codifiers; but that is not to the purpose. We must give it such application as is in harmony with the spirit of the change sought to be made in the practice. Should we hold that it meant a sealed instrument exclusively, or even a written contract, we would abridge the former rule of set-off very materially, and exclude many causes of action upon contracts express and implied to the interposition of which by a defendant, no philosophical objection has ever, nor can be successfully urged. Should we adopt the most extended signification the term will bear, we would introduce disorders into the practice which must readily suggest themselves to any mind at all familiar with the science of the law. We are of opinion that it was designed to enlarge the doctrine of set-off so as to include all causes of action arising *ex contractu*, whether the damages are liquidated or unliquidated, and that the Defendants' proof should have been received.

The remaining points made by the Defendants so far at least as we deem them material to the decision of the case, relate to the rule by which the damages sustained by the Plaintiffs, by reason of the failure of the Defendants to furnish lumber to be manufactured under the contract are to be measured. They refer as well to the rulings of the Court upon the admission and rejection of evidence touching these

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damages, as to the instructions given and refused to be given to the jury on that question.

After a careful examination of the law in regard to the measure of damages in cases of this kind, in which we have been greatly enlightened by the thorough discussion which counsel on either side gave to the question, we cannot resist the conclusion that the Court below erred in refusing to instruct the jury, that, in estimating the profits which the Plaintiffs might have realized in the manufacture of lumber under the contract, from Sep. 2d, 1857, to Sep. 1st, 1858, they should take into consideration, as a part of the cost of manufacturing, the rent of the mills during said period.

When one party to an executory contract like that on which this action is brought, refuses further to comply with it on his part, the other party has an immediate cause of action for said breach; and may sue at any time and recover the damages which he may have sustained, by being deprived of the benefits accruing to him under it; or he may treat the contract as continuing, and, by holding himself in readiness to perform on his part, may, from time to time, or at the expiration of the contract, sue and recover for the damages which he may have sustained at the time of the action. But the rule of damages differs materially according to the course pursued. If he treat the contract as ended and sue immediately upon the breach, his damages are to be measured by the value of the contract to him at the time it was broken; and this value is estimated by the profits which he would have realized during the continuance of the contract, had it been faithfully carried out by the parties. But in estimating the profits which a party under such a contract would realize, allowance must be made for every item of cost and expense necessarily attending a full compliance on his part. If, therefore, the contract is for manufacturing a given article, and mills and machinery are necessarily employed in making it, the reasonable or usual rent, or value of the use of such mills or machinery enter into the costs of manufacture, and should be taken into consideration in estimating the profits, because the profits are as directly affected by such expenses as by any other.

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But should the party who is not in default pursue the other course, and, treating the contract as continuing, hold himself and his mills and machinery in readiness, and maintain his ability to perform the contract on his part; then his damages cannot be measured by the profits alone, which would probably have accrued to him; because they will not compensate him for the injury he has sustained. Let us suppose by way of illustration, an executory contract for the manufacture, at a given price, of some article which can be made by the use of mills and machinery only; and that the contract is to continue one year. That the use of the mills and machinery, or the reasonable rent therefor for the term, is $10,000, and the other expenses necessarily attending the production of the article, would amount to $30,000, and that, at the contract price, the gross earnings of the manufacturer during the time would amount to $50,000. Here, then is a clear profit of $10,000 to the manufacturer; and if the other party should refuse to comply with the contract, and the manufacturer should also abandon it and sue for damages, these prospective profits would cover all the loss which he has really sustained. But then he may not desire or be in a condition to abandon the contract. He may have been at the expense of erecting mills and machinery to carry out the contract on his part; or may have rented them for the term, for the same purpose; and if, under such circumstances, he still holds himself and his mills and machinery in readiness, and maintains his ability to perform on his part during the time fixed for the continuance of the contract, it is clear that the $10,000 profit which he might have made would not cover his loss; for it would exhaust the whole of that sum to pay the rents which he has incurred, and he would derive no benefit whatever from his contract. And if, in the case supposed, the profits were $5,000 instead of $10,000, and the amount of damages which the party could recover were limited to the profits merely, he would be behindhand on the rent alone some $5,000, after applying towards its payment all the damages which he could recover.

If, therefore, the Plaintiffs in this action, after the Defendants had refused longer to furnish logs for the mills to manufacture, had kept the mills in readiness to perform the

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contract on their part, up to the said 1st day of Sep. 1858, and had made proper allegations and proofs to that effect, the instruction which the Court gave to the jury in regard to the rents of the mills in the meantime, would have been correct, although the mills may have remained idle during the whole period.

But we regard this action as one in which the Plaintiffs treat the contract as at an end, and sue to recover for the price of the work previously done, and materials, &c., furnished under it; and for damages sustained by reason of the Defendants' abandonment after the 2d day of September, 1857. They do not allege a present and continuing readiness, willingness or ability to perform the contract after the alleged refusal of the Defendants further to furnish the mills. The general averment that "they have at all times and in all things kept and performed their contract" is made before any breaches are assigned, and evidently refers to what was done prior to the abandonment of the contract by the Defendants on the 2d day of September, 1857. It is true that they allege and endeavored to prove that damages to the amount demanded for this cause of action, accrued to them during the time transpiring between the abandonment by the Defendants and the 1st of September, 1858, and predicate these damages upon the profits which they would have made during said time, but then it was their own fault that their allegations and proofs were thus limited. They were at liberty to claim less than they were entitled to, and to confine their allegations and proofs to any time within that limited by the contract.

The complaint, as to this cause of action, omitting the special allegations as to when and how the damages accrued, is, in form, about as the pleader would have drawn it, had the action been commenced immediately after the 2d of September, 1857, when the breach complained of occurred. There are no allegations upon which to found a claim for damages beyond the prospective profits which the Plaintiffs would have made out of the contract. They do not, as before stated aver that they held the mills in readiness to manufacture lumber for Defendants during any particular time after the 2d of

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September, 1857, while the proofs show that soon after the Defendants refused to proceed under the contract, the Plaintiffs put it out of their power to comply on their part, by surrendering the mills to their lessors.

It is in this view of the case that we regard the several objections of the Defendant, predicated upon the omission of Plaintiffs to allege and prove a present and continuing readiness and ability to comply on their part as unimportant. The Plaintiffs, without such allegations or proofs had a right to recover damages for the injury sustained, to be estimated by the value of the contract to them at the time of the breach, or by the profits which they could have realized under it.

If, as we have before stated, the Plaintiffs had held the mills in readiness to manufacture lumber for the Defendants under the contract, up to the said 2d day of September, 1858, and then sued for the damages sustained up to that time, making proper allegations and proofs of the fact of such continuance, readiness and ability, the rule of damages would have been different as we have endeavored to show. The charge of the Court in regard to excluding the rent of the mills from the consideration of the jury, would then have been correct. But as the pleadings stand, we hold that the damages which the Plaintiffs sustained by the breach under consideration are to be measured by the profits which would have accrued to them had the contract been faithfully kept by the Defendants, and that the jury should have been instructed that in estimating these profits the rent of the mills should be taken into consideration as part of the cost of manufacturing the lumber.

There must be a new trial of the case.

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JOSEPH T. ARNOLD, *et als.* Appellants, *vs.* EDWARD WAINWRIGHT, Respondent.

APPEAL FROM THE DISTRICT COURT OF NICOLLET COUNTY.

The real estate of a partnership is in equity treated as mere personalty, and governed by the rules and doctrines applicable to that species of property.

Whether land is to be deemed part of a partnership stock depends upon the agreement of the partners, which agreement may be either express or implied.

Lands may be converted into partnership stock by parol agreement of the partners, or by such facts and circumstances attending its acquisition or use, as will raise an implication that the partners so intended. The legal estate will be controlled by the terms of the conveyance, but equity will subject the lands to the same liabilities imposed upon other partnership estate, and restrict the partners to the same extent in their disposition of them as obtains in regard to the personalty.

The Statute, pages 382-3-4, although designed to do away with some trusts that would otherwise result, was not intended to cut off trusts in favor of a partnership, where the lands are conveyed to the individual members of the firm as tenants in common. Nor does the recognition of such a trust conflict in any manner with the Statute of Frauds. Such a trust, while it will be enforced against a purchaser or mortgagee, from one of the co-partners or his representatives, who has notice, actual or constructive, that the land is partnership property, cannot be enforced against a *bona fide* purchaser or mortgagee without such notice.

This was an appeal from an order overruling a motion for judgment on the pleadings made by the Defendants in the Court below. The Appellants' points disclose the grounds of the motion for judgment.

Points and Authorities of Appellant.

V.—All the rights and interests which the Plaintiff claims in the premises described in the complaint, adverse to the rights and equities of these Defendants respectively therein, rest upon an alleged oral contract of partnership, which, so far as it affects the title to the said real estate, is void by the statute of frauds. *Compiled Stat.* 457, *chap.* 49, *sec.* 6. The deed or conveyance mentioned in that section must conform to the provisions of the statute of deeds, &c. *Comp. Stat.* 397, *chap.* 35.

VI.—While the Plaintiff claims equities in the premises

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on the ground that the same were and are the property of the alleged partnership, (and he does not claim any other right therein, adverse to these Defendants) he wholly fails to show that the said premises are or ever were the property of the alleged partnership, as such. He fails to show that the property was ever converted into partnership stock or capital. He fails to show that the property was purchased with partnership funds; but on the contrary, he does show, that at the time of the purchase of the different parcels of the premises, there were no partnership funds or capital,—that there had not then been any partnership formed,—that the said premises were purchased in different parcels, at different times, and by different members of the alleged partnership, with their own separate and respective individual funds,—that the said parcels thereof were owned by them respectively in severalty prior to and at the time of the alleged formation of the alleged partnership. He also shows that the alleged conversion of the premises into partnership stock, was made by oral agreement only. These facts do not operate a conversion of real estate into partnership capital, though they be followed by a partnership user. *Coles vs. Coles*, 15 *John. Rep.*, 159; *Dyer vs. Clark*, 5 *Met. Rep.*, 562; 1 *Am. Lead. Cas.*, 336; 12 *Leigh's Rep.*, 265; *Frank vs. Branch*, 16 *Conn. Rep.*, 261; *Hale vs. Henrie*, 2 *Watt's Rep.*, 143; 1 *Lead. Cas. in Eq.*, 155, 158; *Randall vs. Randall*, 3 *Sim. Rep.*, 271; 1 *Crabb on Real Prop.*, *sec.* 78; *Thornton vs. Dixon*, 3 *Bro. C. C.*, 199; *Cookson vs. Cookson*, 8 *Sim. R.*, 529; *Baldwin vs. Shore*, 9 *Ves. R.*, 500; *Bell vs. Phyn*, 7 *Ves., R.*, 453; *Watson on Part.*, 82; 2 *Montague on Part.*, 212; *Smith vs. Smith*, 5 *Ves. R.*, 189; *Smith's Mercantile Law*, (*Hol. & Ghol. Ed.*) 53, *note; Collyer on Part.*, *sec.* 135 *to* 160; *Comynon Cont.*, 533 *to* 540; *Ripley vs. Waterworth*, 7 *Ves. R.*, 425.

VII.—An original contribution or appropriation of real estate by one partner to partnership stock or capital, cannot, by the law, be made by parol, or otherwise than by conveyance or covenant in such form as to operate a conversion of such property to such stock or capital, and charge it with a trust to the use of the partnership. As there cannot be, at law, a partnership in the title to real estate, it is only through the

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medium and operations of a trust, that it can be converted into personal assets and administered as partnership property. Such trust cannot result or be implied unless the fund invested in the property, has been previously charged with it, so that equity may follow, seize upon and administer the trust with which the fund thus invested in the real estate was charged. Hence, in the absence of such pre-existing trust upon the fund, from which a trust upon the real estate purchased with it, will result, a conveyance or covenant competent to create such trust, without which a conversion cannot be effected, becomes absolutely necessary. Both the statute of frauds and the statute of uses and trusts require it, if indeed the statute of uses and trusts does not prohibit it altogether. *Comp. Stat.*, 382, *ch.* 32, 457, *ch.* 49, *sec.* 6; 5 *Met. Rep.*, 562; 1 *Am. Lead. Cas.*, 336, *&c;* 1 *Lead. Cas. in Eq.*, 155, *&c; and other authorities before cited*; 1 *Parsons on Cont.*, 125 *to* 131.

VIII.—The conveyances described in the Plaintiff's complaint, by which the Plaintiffs, Alfred F. Howes and John L. Howes, became tenant in common of the premises, being absolute in terms to convey the unconditional and unqualified title or estate in fee to the grantees named therein, repel and destroy all presumption of any trust therein to the use of the alleged partnership; and such trust does not, nor can, by the law, result from any fact or combination of facts alleged by the Plaintiff in his pleadings; nor can such a trust be engrafted upon those conveyances by parol evidence, for the purpose of converting such estate into personal estate to be administered as partnership assets. Such conversion involves a change of title, and the creation of both a trust estate and a lien,—a change of the absolute deeds conveying the title, into mere declarations of trust. That cannot be done by parol, but requires, at least, a covenant. *Comp. Stat.*, 382, *ch.* 32; 397, *ch.* 35; *and* 456, *ch.* 49. Many of the authorities before cited sustain this poposition,—and in every case in which there has been an original contribution of real estate to partnership capital, such contribution has been made by covenant,—generally in the sealed articles of partnership.

IX.—To effect a conversion of real estate into partnership

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capital as an original contribution thereto, it is necessary that the means of an actual conversion thereof for the purposes of application to partnership uses, or of distribution among the partners, should be provided by the deed, otherwise it is not converted. 1 *Lead. Cas. in Eq.*, 161, and cases there cited; *Collyer on Part.*, 93, 2*d Ed.* The reason is obvious, for the power of actual conversion must accompany the trust, and in such case both the trust and the power must be derived from the deed, and cannot result by implication of law. In this case the deeds do not contain either the declaration of the trust or the power.

X.—Though the said property had been, in equity, converted into partnership capital, the partners were tenants in common of the legal title, free and unaffected by the trust to the use of the partnership, until the business of the partnership had commenced and so operated as to create an interest or liability, to uphold the trust. The object of the partnership as stated in the complaint was "the establishment of a forwarding, commission, warehouse and storage business." When that business was established the Plaintiff fails to show, and until the business was established, the partnership rights and liabilities did not commence. *Murray vs. Richards*, 1 *Wend. Rep.*, 63; 1 *Smith's Lead. Cas.*, (*Hare & Wal. Ed.*) 735; 9 *John. Rep.*, 488.

It does not appear that any "forwarding, commission, warehousing or storage business" had been done, at the time of the execution, or recording of either the mortgage to Arnold, or the mortgage to A. F. and S. R. Howes.

XI.—The trust to the use of the partnership, with which partnership property is encumbered, ceases with the settlement and extinction of all partnership liabilities, *inter se* and to third persons. Only such liabilities uphold the trust, and when they cease the trust ceases, and the partners are tenants in common of the partnership property, discharged of the trust. The authorities cited sustain this position. It is in fact self-evident. In case of dissolution of the partnership, the settlement of the accounts and the disposition of the property must be as of the day of the dissolution. *Stoughton vs.*

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Lynch, 2 *John. Ch. Rep.*, 209; *Dyer vs. Clark*, 5 *Metcalf's Rep.*, 562.

The Plaintiff fails to show at what time he considered the firm dissolved. He treats the point strangely, and seems to regard the firm yet in being, and still in full and active business as such, for some purposes, while for others he treats it as long since dissolved.

If it ever existed at all for the purposes or in the business specified in the complaint, it was, if the real estate belonged to it as such, dissolved on the 26th August, 1857, when the mortgage to Arnold was made, or certainly when that mortgage was recorded on the 15th February, 1858.

Consequently, the mortgage to Arnold and the subsequent mortgage and conveyances were taken by the mortgagees and grantees, subject only to the state of the partnership accounts at the date of the mortgage to Arnold or the date of the record thereof; and it does not appear by the Plaintiff's pleadings that there was then any partnership liabilities or that the partnership business had commenced, but it does appear in the answer of Defendants, A. F. and J. L. Howes, that such business did not commence till March, 1858. It follows that even though the property had been converted into partnership capital, there were not at the time of the dissolution, any partnership dealings or liabilities to uphold the trust to the use thereof. The onus of alleging and proving that such liabilities did then exist, rests upon the Plaintiff, for they are necessary to sustain the interest which he claims.

Points and Authorities of Respondents.

V.—To the fifth point raised by Defendants' counsel, we reply, that these Defendants now before the Court for the purposes of this motion are not parties to any oral contract with the Plaintiff, by which the title, interest or estate, or the conflicting rights and equities in or to any real estate claimed by the Plaintiff to be partnership capital can be affected as between them and this Plaintiff by any statute of frauds. It has recently been held in Maine, that notwithstanding the statute of frauds a parol trust might exist and be proved by

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parol against third persons as creditors. The statute, as was said, was not intended to prevent the voluntary execution of such a trust, but only its enforcement against the trustee; and where it has already been executed even this saving clause cannot apply, and such trust would be good as against everybody. *Brown vs. Lynt*, 37 *Maine*, 434; *Hill on Trustees*, 87, *note* 1.

If the contract, though oral, was made and executed or in part executed immediately thereafter, the statute of frauds, in a court of equity, will not render the contract void, but will aid and enforce the contract. If such a contract was made, as alleged in the complaint, and executed, or in part executed, the real estate embraced by the contract, became in equity the personal property of the partnership, and the several partners representing the undivided interests therein sustained to each other the relation of trustee and *cestui que trust*. The real question then is, "Was there a partnership, and were the lands put in by the partners capital stock and so regarded by them, as set out in the complaint?" If so, then the statute of frauds has no application, and the property of the partnership will be liable, first to the claims of general creditors; secondly to the claims of partners, and lastly to the separate claims of the creditors of the separate partners. *Comp. Stat. Minn., p.* 457, *sec.* 10,—*p.* 382, *sec.* 6; *Foster vs. Hale*, 5 *Ves., Jr., p.* 308; 3 *Vesey*, 696; *Dale vs. Hamilton*, 26 *Cond. Eng. Ch. R.*, 368; *Sumner vs. Hampton*, 8 *Ohio*, 340 *and* 364; 1 *Story's Eq. Jur., secs.* 674-5-6; 2 *Ibid.*, 759, 761; *Smith on Cont., p.* 69, 71; *Gow on Part., ch.* 2, *sec.* 1, *p.* 32, 36; *Story on Part., secs.* 82-3, 93; *Collyer on Part., p.* 80, 72, 76; *Kent, p.* 37-8-9; *Adams' Eq., side page* 35; 5 *Cond. Eng. Ch. R.*, 382, (*Fariday vs. Wrightson*); *Dyer vs. Clark*, 5 *Metcalf*, 562 *and* 582; *Crooker vs. Crooker*, 46 *Maine R.*, (*American Law Reporter, Vol.* 9, *July*, 1861, *p.* 539); *Smith vs. Burnham*, 3 *Sumner*, 435, (*over-ruled*); 1 *Lead. Cas. in Eq., under Lake vs. Craddock*, 155, 1*st Ed.*; *Robinson vs. Crowder*, 4 *McCord R.*, 519. *Cases where the questions arose between the representatives and the heir, and case of agreement express or implied*; *Balmain vs. Shore*, 9 *Ves.*, 500; *Smith vs. Smith*, 5 *Ves.*, 189; *McIntosh vs. Davayness, quoted in Montague on Part., Vol.*

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1, *p.* 97; *Bell vs. Phynn*, 7 *Ves.*, 453; *Ripley vs. Waterworth*, 7 *Ves.*, 425; *Green vs. Green*, 1 *Ohio*, 534; *Collyer on Part.*, *p.* 72, 74, 76; *Sigourney vs. Munn*, 7 *Conn. R.*, 11; 8 *Ohio*, *as to the opinion of the Chancellor in this case*, *p.* 336-7; *Goodwin vs. Richardson*, 11 *Mass. R.*, 469, *commented on in* 3 *Kent*, 38-9, 41; 4 *Warden*, (*Ohio*,) 1.

VI.—One-half of the real property in this case was purchased and the whole put in, as part and parcel of the capital stock as will appear in evidence from the partnership books. Notwithstanding these facts appear on the pleadings, the counsel for the Appellants in the sixth point assume the following positions: "That while the Plaintiff claims equities in the premises on the ground that the same were the property of the alleged partnership as such, he fails to show that the property was ever converted into partnership stock. He fails to show that the property was purchased with partnership funds," &c.

It appears that a part of the real estate, bought and paid for by Wainwright was transferred to the Defendants Alfred F. and John L. Howes, under the impression that such an exchange and equality of interest by deed and upon the record was necessary to perfect the ownership of the property in the firm. The partnership is not only alleged, but admitted by the Defendants Alfred F. and John L. Howes; and Alfred F. Howes in his answer admits his liability to the creditors of said firm, but claims that his relation in the premises was only that of a tenant in common. But it matters not what legal deductions the Defendants or Plaintiff may draw from these facts; such deductions do not affect the facts themselves nor the legal consequences flowing from them. The pleadings show fully that the object of the formation of the copartnership was "the establishment of a forwarding, commission, warehousing and storage business in St. Peter." To this end all necessary precedent acts must be construed as contributing. The purchase and dedication of real estate as a location and the erection of a proper building as the place of business, necessarily preceded the business itself. These acts of the copartnership, the purchase by Wainwright, the distribution of the title, the purchase of materials, and the giving of the

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partnership notes therefor, the erection of the building thereon, and the entry of the valuation of their several contributions of the real estate to the capital stock by each on the partnership books, were the natural and necessary steps of the partnership in arriving at the object of the formation of the co-partnership. These several acts themselves done with the assent and approval of the several parties would constitute an implied partnership without other evidence of contract, and subject the property thus acquired and used, to all the liabilities of the co-partnership in the particular business thus indicated. But in addition to the acts of the parties in this case, we have positive allegations in the complaint, and the admissions of the other partners that the partnership did exist. The partnership being admitted, the other Defendants, Arnold, Swift, Samuel R. and George E. Howes, are charged with actual knowledge and notice of the fact of the co-partnership, and in equity deal with it under this notice, subject to all its consequences. *Dob vs. Halsey*, 16 *John.*, 34; 6 *Blackford*, 388; 10 *B. Monroe*, 493; 46 *Maine R.*, 250, *Croker vs. Croker.*

It is true that in almost all the cases, real property has been purchased by a partnership already existing, and with the funds of the partnership thus formed, but that cannot alter the principle, as has been most conclusively shown in the case of *Dale vs. Hamilton*, 26 *Eng. Ch. R.*, 368, to which case we invite the particular attention of the Court, because in its leading facts it is similar to this case.

There is great diversity of judicial opinion on the question whether real estate, though bearing the character of personalty as between the partners themselves, is to be treated as real or personal estate as between the heir and personal representatives of a deceased partner.

Mr. Bisset, in his treatise on the law of partnership, deduces from an elaborate examination of the English cases, the following general conclusions:

1. "That in the absence of any specific agreement to the contrary, real estate purchased with partnership funds, for partnership purposes, is converted out and out into personal estate, and therefore goes to the personal representative, and not to the heir of a deceased partner.

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2. "That real estate purchased with partnership property, but not for partnership purposes, is not converted into personalty.

3. "That real estate, brought into partnership by a partner, under an agreement that during the partnership, and if necessary for partnership purposes, after the expiration thereof, it should be considered as personal estate, but not purchased with partnership funds, and not required to be sold for payment of debts, or for any of the other purposes of the partnership, is not converted into personal estate as between heirs and personal representatives.

4. "The real estate devised to partners is not partnership property, though used for partnership purposes.

5. "That though partners purchase with partnership funds, the equity of redemption of mortgages devised to them, the equity of redemption follows the mortgage, and does not become partnership property."

"At law, however, real estate owned by a partnership, is held by them subject to the ordinary incidents of land held in common." *Smith's Mercantile Law, 3d Ed.*, 59 *and* 60.

VII.—A partnership, the substratum of which is, in whole or in part, real estate, may be formed by parol, and the partnership property, whether real or personal, of the partnership so formed will, for partnership purposes, both during and after the expiration of the partnership, be treated as personalty.

To hold that the partners cannot, whatever be their intention, reduce real estate to capital stock in the first instance without first mingling their money together and saying, "here, this money is now our capital stock," then again "paying it out" in exchange for real estate, so that the "trust with which the fund had been previously charged," could slide off upon the land and "charge" that, is simply absurd.

Is not an original, as strong and efficient as a secondary trust? Has the statute of frauds or the statute of uses and trusts any more application in the former than in the latter case? The authorities cited by the Appellants in their seventh point by no means sustain their position.

VIII.—The form of the deed or conveyance by which the

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property is held to the firm, or title taken, whether absolute in terms, or expressing the trust upon its face, whether running to a single partner or to all the co-partners jointly, is immaterial. That the conveyance is absolute in terms defeats no presumption of a trust in the estate conveyed, or of an equitable lien thereon, to the use of the firm. *Crooker vs. Crooker et als.*, 46 *Maine R.*, 250; 1 *Am. Lead. Cas.*, 488, *and cases there cited*; 1 *Story's Eq.*, *sec.* 774.

IX.—The refutation of the eighth position of the Appellants' counsel disposes of the ninth, the former being the argument by negation, and the latter by affirmation, of the same proposition.

The authorities cited in the ninth point do not sustain the principle contended for.

X.—It being established that the real estate had been in equity converted into partnership assets, it follows, that from the moment of such conversion, "neither partner can have an ultimate and beneficial interest in the capital until the debts are paid and the accounts settled. It follows as a necessary consequence that such partnership real estate cannot be conveyed and alienated by one of the partners alone without a breach of trust; and that such a conveyance would not be valid against the other partner. *Dyer vs. Clark.*

"Without the consent of the other partners the transaction is void and the partnership title is not divested in favor of such separate creditor whether he knew the property belonged to the partnership or not;" 1 *Am. Lead. Cas.*, 3*d Ed.*, 449 *and* 450, and cases there cited. And the complaint not only shows that the Plaintiff did not consent to these conveyances but that they were fraudulently concealed from him by his co-partners who still maintained full fellowship in the firm and control of the property.

There is no question but that a sale or conversion of any part of the capital stock by one partner in satisfaction of his own private debt, is void as to the partnership, and being void such sale or conversion cannot affect the rights of the other partners, unless and not until adopted and confirmed by them. *Sutcliff vs. Dohrman*, 18 *Ohio*, 181.

XIV.—None of the Appellants have the rights of a *bona*

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fide purchaser for a valuable consideration; and hence their claims are superceded by the equities of prior parties.

The Defendant Arnold, is not only charged with actual notice, but the only consideration for the execution of the mortgage to him was a prior indebtedness, which, though good between the parties, is not sufficient to shut out the equities of prior parties. *Willard's Eq.*, 124; *Coddington vs. Bay*, 20 *J. R.*, 637; 5 *J. Ch. R.*, 54; 21 *Wend.*, 499.

CHATFIELD & BUELL, Counsel for Appellants.

C. S. BRYANT, and HORACE AUSTIN, Counsel for Respondents.

By the Court.—FLANDRAU, J.—This Court has on several occasions been called upon to decide questions involving the rights and interests of partners in the partnership effects, and we have always held that such interest is a share (limited by the articles of partnership) in the surplus remaining of the partnership property, after paying off all the debts of the partnership. *Pease, Chalfant & Co. vs. Rush, Pratt et al.*, 2 *Minn. R.*, 107; *Moss vs. Pettingill*, 3 *Minn. R.*, 216; *Harmon, Aiken & Gale vs. Schalck & Fenske, ante, page* 265. Each partner has a lien upon the partnership property, to the end that he may insist upon its being first applied to the payment of the firm debts; or as it is sometimes expressed, the partnership property is held by the partners subject to a trust for the payment of the firm debts, and neither of the members can divert it into any other channel. This interest of the individual partner in the assets of the firm is assignable, and may be taken in execution.

There is very little difficulty in adjusting the rights of partners, and the creditors of partners, in the partnership property, when once the fund and the liabilities are ascertained, as the law governing these relations is pretty well understood and settled. A much more troublesome question frequently arises as to what is, and what is not, properly partnership property, especially in regard to real estate not designated in the conveyances to the partners, as belonging to the stock of the partnership.

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In regard to all lands which are ascertained to be partnership property, the rule in equity is, that they shall be treated as mere personalty, and be governed by the rules and general doctrines applicable to that species of property. *Story on Partn., sec.* 93. "The ground of this doctrine appears to be a special interference of equity in favor of commerce, whereby the trust is separated from the legal estate, and the latter being left to pass according to the nature of real property, the trust estate is made subject to the rules of partnership personal property, so far as concerns the interest of the partners in relation to one another, and those who are in privity with them. 1 *Am. Lead. Ca.*, 336, *note to Coles vs. Coles and Dyer vs. Clark.*

Whether land is to be deemed part of the partnership stock depends upon the agreement of the partners, which agreement may be either express or implied. After a very careful examination of the authorities, and the statutes of this State concerning trusts and fraudulent conveyances, we are of the opinion that lands may be converted into partnership stock by parol agreement of the partners, or by such facts and circumstances attending its acquisition, or use, as will raise an implication that the partners so intended. The legal estate will be controlled by the terms of the conveyance, but equity will subject the lands to the same liabilities imposed upon the other partnership estate, and restrict the partners to the same extent in their disposition of them as obtains in regard to the personalty.

The elementary writers do not furnish a very satisfactory solution of the question as to what character of agreement between the partners will work a conversion of lands into partnership stock. They agree that it may be accomplished by agreement express or implied," and we think it is the necessary result of their views as expressed in their text and the numerous cases cited by them, that the intention of the partners, to be ascertained from their acts or agreements is to govern, and that no express agreement in writing is necessary. See *Collyer on Part., p.* 68 *to* 78; *Story on Part., secs.* 92–3; 3 *Kent. Com.*, 37, *Title*, "*of stock in land;*" 1 *Maddocks Ch.*, 93–4; *Lomax's Dig. of the Law of Real Property, Vol.* 1, *p.*

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212–13, *marginal*; *Adams' Doctrine of Eq.*, 35, *marginal.* This latter author in treating the subject of trusts, adopts the decision in the case of *Dale vs. Hamilton*, 5 *Hare*, 369, 382; 26 *Eng Ch. R.*, 368, and says:

"In accordance with the same principle, it is held that if land is acquired as the substratum of a partnership, or is brought into and used by the partnership for partnership purposes, there will be a trust by operation of law for the partnership as tenants in common, although a trust may not have been declared in writing, and the ownership may not be apparently in all the members of the firm, or if in all, may apparently be in them not as partners but as joint tenants."

In a very recent case in Maine, the whole subject was ably discussed, and it was held that the trust attached to lands owned by the partnership without regard to the character of the deed by which the partners held. *Crooker vs. Crooker, published in the Am. Law Reg. for July*, 1861, *and which will be reported in* 46 *Maine R.*, 250. We make the following extract from the opinion of the Court from *page* 544 *of the Am. Law Register.*

"Each partner is entitled to regard the whole estate as held for his indemnity as against the joint debts, and as security for the ultimate balance which may be due to him for his own share of the partnership effects. *Story on Eq.*, *Vol.* 2, *sec.* 1243, *Hoxie vs. Carr*, 1 *Sumner*, 173; *Buchan vs. Sumner*, 2 *Barb. Ch. R.*, 198-9.

"In relation to real estate when it is part of the partnership effects, it is to be treated in equity to all intents and purposes as a part of the partnership funds; and whatsoever may be the form of the conveyance, it will be held subject to all the equitable rights and liens of the partners which would apply to it, if it were personal estate; and this rule prevails notwithstanding the legal title may, by the death of the particular party holding it, have been cast by descent upon his heirs at law. 1 *Story's Eq.*, *sec.* 647, *and cases there cited*; *Dyer vs. Clark*, 5 *Metcalf*, 562. Such is the rule, also, notwithstanding the estate may have been conveyed to the partners by such deed as under our *R. S. of* 1841, *ch.* 91, *sec.* 13 and the revision of 1857, *ch.* 73, *sec.* 7, would at law make

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them tenants in common. *Burnside vs. Merrick*, 4 *Met.*, 537; *Howard vs. Priest*, 5 *Met.*, 582; *Fall River Whaling Co. et als. vs. Borden*, 10 *Cush.*, 458, *before cited.* Nor does it make any difference that the deed makes no reference upon its face to the grantees as partners. *Tillinghast vs. Champlin et al*, 4 *Ames* (*R. I.*,) 173."

Where the land is purchased with partnership funds, to be used and applied to partnership purposes, and is treated by the partners as part of the partnership stock, it will be treated in equity as held in trust for the partnership until the partnership account is settled and the partnership debts are paid. *Howard vs. Priest*, 5 *Met.*, 582; 1 *Am. L. C.*, 336, *note.*

It is contended that no trust in favor of a partnership can arise under our statute of uses and trusts, when the lands are conveyed to the individual members of the firm as tenants in common, or otherwise than as partners. A careful examination of this statute (*Comp. Stats.*, 382-3-4,) satisfies us that, although the act was designed to, and does do away with some trusts that would otherwise result, it was not the intention of the framers to cut off trusts of this nature. If the statute contains any prohibition of such a trust as we are considering, it must be found in *section* 5, which declares "That every disposition of lands * * * shall be directly to the person in whom the right of possession and profits shall be intended to be vested," &c. But this section is qualified by the succeeding one, which declares that it shall not extend to trusts arising or resulting by implication of law," &c. And *section* 10 distinctly recognizes "implied or resulting trusts," by providing that such trusts shall not "be alleged or established to defeat or prejudice the title of a purchaser for a valuable consideration, and without notice of such trust." Nor do we think that the recognition and enforcement of such a trust conflicts in any manner with the statute of frauds. *Sec.* 6, *p.* 457, *of the Comp. Stats.* provides as follows:

"No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance

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in writing subscribed," &c. This section expressly excepts such trusts as the one under consideration, resulting by operation of law from the peculiar situation of the lands, and the relation of the grantees or owners. That the powers of the court of equity were not to be limited by this act except where specially provided, appears more clearly from *section* 10, which provides that "nothing in this chapter contained shall be construed to abridge the power of courts of equity to compel the specific performance of agreements in cases of part performance of such agreements," meaning necessarily such agreements as would otherwise fall within its prohibitory clauses.

The remaining question is, whether the Plaintiff shows that the lands in controversy were partnership property. It appears that the Plaintiff and the Defendants, Alfred F. and John L. Howes, on the 22d of June, 1857, formed a partnership under the name of "Howes & Wainwright," the object of which was the establishment of a forwarding, commission, warehousing and storage business. Prior to this date John L. Howes owned one half, or the southerly forty-four feet of the land in dispute. At the formation of the co-partnership, the Plaintiff, at the request of John L. and Alfred F. Howes, purchased the other half or the northerly forty-four feet of said land. It was then agreed between the partners verbally that the eighty-eight feet should be put in, and become part and parcel of the capital stock of the firm, to be used and employed for the sole benefit of the firm, and for carrying out the objects of the co-partnership. The partners then by a series of deeds, vested in each member of the firm one equal undivided third part of the whole eighty-eight feet. Thus, the Plaintiff conveyed to John L. Howes two-thirds of the northerly forty-four feet, and John L. Howes conveyed to the Plaintiff one-third of the southerly forty-four feet, and to Alfred F. Howes two-thirds of the whole eighty-eight feet. The two first deeds were executed on the 22d day of June, 1857, the day on which the co-partnership was formed, and the deed to Alfred F. Howes was executed on the 26th day of the following August. The title therefore so far as was apparent from the conveyances was held by the members of the firm as tenants in common.

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In July, 1857, prior to the deed to Alfred F. Howes, the firm commenced the erection of a warehouse on the southerly forty-four feet of the land, for the purpose of carrying into effect the objects of the co-partnership, reserving the northerly forty-four feet for the convenience of the partnership business. The building was completed in the spring of 1859, the Plaintiff paying one-third of the cost, and the other two members each engaging to do the same. Partnership debts to a considerable amount were contracted in the erection of the building. The business of warehousing, forwarding, commission and storage was after the erection of the building actually entered into by the firm, and conducted in the building until the dissolution of the partnership.

It is contended by the counsel for the Defendants that as the object of the partnership was the establishment of the business of forwarding, commission, warehousing and storage, the partnership did not go into effect until the business was actually commenced after the erection of the warehouse. This view we cannot adopt. It is at variance with, and too narrow a construction to be placed upon the acts and agreements of the parties. The nature of the business contemplated by the partnership required that the principal part of the capital stock of the firm should consist of the warehouse, the land upon which it stood and a convenient area about it. No step could be taken towards transacting either branch of the proposed business,—commission, forwarding, warehousing or storage, without a warehouse or store, which must have been either purchased, rented or built. The partners adopted the latter. This step taken, and very little more capital stock was needed to carry on the business save the labor and skill of the several partners. Were the acts alone of the parties, without their agreements, placed before us as our guide, we could hardly resist the conclusion that it was their intention to make a contribution of the land and building to the capital stock of the firm.

We have so far considered the question as between the partners themselves. We will now examine it in its bearings upon third parties. If the conveyances, as in the case at bar, make no reference to the land being partnership stock, but

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vest the title in the several members as tenants in common, then the trust which arises between the partners cannot be enforced against a *bona fide* purchaser or mortgagee without notice, (*Comp. Stats.*, 382, *sec.* 10,) but will be enforced against a purchaser or mortgagee from one partner, or his representative, who has notice actual or constructive that the land is partnership property. *Lomax's Dig.*, *Vol.* 1, *p.* 254-5; 1 *Am. Lead. Cas.*, 339, *note to Coles vs. Coles and Dyer vs. Clark*; *Edgar vs. Donolly*, 2 *Munford*, 387; *Hoxie vs. Carr et al.*, 1 *Sumner* 174, 192; *McDermott vs. Lawrence*, 7 *Serg. & Rawle*, 438; *Ford vs. Heron*, 4 *Munford*, 316; *Frink vs. Branch*, 16 *Conn.*, 261, 271; 3 *Kent's Com.*, 39, 40.

In the case at bar, the Defendants Arnold and Samuel R. Howes are charged distinctly with actual knowledge that the lands were partnership property, and the consideration moving from them for their conveyances are assailed in a manner that would take from them the character of *bona fide* purchasers, even if they had not been notified. The consideration for the assignment of the mortgage to George E. Howes is also alleged never to have been paid, nor intended to have been paid, which places him in the same position with the Defendants Arnold and Samuel R. Howes. The Defendant Swift being merely the assignee of an insolvent estate for the benefit of creditors of course takes the land *cum onere*.

The Defendants' counsel pointed out some slight inconsistencies between the allegations in the complaint and the reply, but we regard them as unimportant in the view we have taken of the case except so far as they may reflect upon the credibility of the Plaintiff's pleadings. The allegations of the complaint alone are sufficient to charge the land in the hands of the Defendants with the trust in favor of the partners, therefore the issues of fact joined must be tried.

The order denying the motion for judgment in favor of the Defendants on the pleadings is affirmed.

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VETAL GUERIN, Appellant, *vs.* HENRY W. HUNT, *et al.*, Respondents.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

The selection of an incompetent assignee by an insolvent debtor with a design to control the administration of the estate is a fraud upon the creditors, and will avoid the assignment. But the selection of such an assignee without an improper motive, will not render the assignment void, but only afford reason for the removal of the assignee, and the appointment of a person qualified to execute the trust.

The ignorance of the assignee, in his being unable to read and write, is a badge of fraud, yet by no means conclusive of the fact, and it may be rebutted by proof of business capacity. Proof of solvency or wealth on the part of the assignee would not be admissible to rebut a charge of ignorance.

Where a partnership makes an assignment for the benefit of creditors of the partnership effects, and such assignment is assailed for fraud, it is incompetent to prove that one of the partners had previously disposed of portions of his individual property on a secret trust in his own favor.

Where an assignment contains general words of transfer, such as "all" the debtors' estate, and subsequent words of description, or a reference to a schedule as setting it forth particularly, the latter will limit the former, and nothing will pass but what is set forth or specified.

On a charge of fraud for the appointment of an incompetent assignee, evidence of how he conducted the business of the assignment, is admissible.

The insertion in the schedule of debts of fictitious demands, and giving them preference, is a badge of fraud, but evidence is admissible in explanation and rebuttal of all proof offered to establish a charge of this nature.

Parol proof of the contents of a letter cannot be given until the absence of the letter is satisfactorily accounted for.

A Judge in charging a jury is less liable to misconstruction when he states his points and their qualifications together, yet his charge must be taken as a whole, and if it contains a correct statement of the law, it will not be held erroneous for want of methodical arrangement.

Points and Authorities of Appellant.

The first exception relied upon is found in folio 67. One of the "badges of fraud" is the insolvency of the Assignee; another, his incompetency. Proof going to establish such or analogous facts, is always admitted against the integrity of the assignment, and is always explainable by other facts indicating good faith. *Burrill on Assignments p.* 400.

Precisely the same doctrine was enunciated by this Court in *Filly et als. vs. Register*, 4 *Min. R.* 405; [*Opinion of Court.*] Proof was there offered showing the notoriety of Mr. Burkleo, and about the premises in controversy. It was received by the Court below, and urged in this Court as error.

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The cases are precisely similar, and would be stated in this wise: "Insolvency in the Assignee is always a badge of fraud and solvency goes to show the contrary." It is difficult to see any distinction. Here the defence had proved by the witness that he could not read nor write, thereby attacking his competency. This testimony went directly to the competency of the Assignee and also to the *bona fides* of the Assignors. We offer affirmative evidence in support of good faith, of the same character, and it is rejected.

The next testimony offered and rejected against the Plaintiff, is found in folio 208 of the case, and was to show the value of the property conveyed to Cummings, Seaman & Co.

I concede to a certain extent the doctrine contended for by Respondent's counsel, that false preferences of fictitious claims is evidence going to show bad faith. This being the position assumed, it was certainly competent for the Plaintiff to rebut the testimony of witness Sanborn, and the deeds. This testimony tended to show that $2,500 of property had been conveyed to Cummings, Seaman & Co., in reduction of their debt against Bartlett & Cazeau, which would, of course, mitigate the claim, *pro tanto*. It was, therefore, as seems to me, strictly competent for us to show that the property actually conveyed, was of little or no value; and thereby abate the force of the presumption arising out of these facts.

II.—I will next advert to testimony received under objection of Plaintiffs' counsel respecting certain conveyances from Cazeau, one of the firm making the assignment to Guerin, the Assignee of the individual property of Cazeau, and other conveyances from Guerin to persons outside.

The contents of the testimony are substantially these:

1st. Deed from Cazeau and wife to Guerin, of lots on 9th street, dated February 5th, 1857, for consideration, stated therein, of $7,000.

The object of the testimony was announced to be, that while the assignment purports to convey all the property of the Assignors, Cazeau had conveyed the property in question on a secret trust to himself, and was, therefore, the beneficial owner thereof himself.

2d, Deed dated February 19th, 1857, of part of same prop-

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erty to Geo. Hadfield, consideration $1,000, from Guerin and wife to Hadfield.

3d. Deed from Guerin and wife to Thos. Rossiter, of part of same property, dated June 25th, 1857; consideration $2,000.

4th. Deed from Guerin and wife to Ingalls, dated August 8th, 1859, consideration $2,600.

5th. Deed, September 20th, 1858, from Guerin and wife, consideration $4,000, to Cazeau and wife, of lots 3 & 4 in block 5.

6th. Deed from Cazeau and wife to Guerin, reconveying same last two lots, dated August 8th, 1859.

It appears from the testimony connected with the transfer, that no money was paid down upon the original conveyance for $7,000, but it was agreed that Guerin should deed Cazeau's wife two other lots to be selected by her, and assume a mortgage then owned by Chas. W. Borup for $3,000, incumbering the same property; that the mortgage was paid by Guerin; that the conveyance was made to Mrs. Cazeau, as shown by deed 25th Sept., 1858; and that about a year afterwards, Guerin bought back the property deeded to Mrs. Cazeau, for $1,600.

Before presenting special views respecting the testimony, it is important in some (although not in all the aspects in which I shall consider it,) to determine the character of the assignment.

It was a partnership assignment made by the firm of Bartlett & Cazeau, of the firm property described in a schedule.

That this was a partnership assignment of copartnership property strictly, would hardly seem to admit of a doubt; and I discuss the question, as the point is made, that it was an assignment both of individual and firm property, and urged with apparant seriousness.

The form is taken from that laid down in Burrill's work on assignments for a Copartnership Assignment. *Vide Burrill, p.* 642.

It is substantially the same form for a similar instrument in McCall's forms, and the Clerk's Assistant, in common use. *2d Ed. Burrill on Assignments, p.* 354; *id. p.* 266, &c.

All the assignment pretended to convey was certain specific

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partnership property, to pay firm debts first, and if surplus remained, individual debts.

The position being granted, the acts or declarations of one partner respecting his separate property, have no relevancy. They could only be shown to defeat a copartnership deed, after it was shown that a quasi conspiracy existed between the parties to hinder, &c. Until this is shown the fraudulent acts of one partner are no evidence of or against the acts of the firm. 1 *Greenleaf on Evidence, sec.* 3.

This is the uniform doctrine. The principle is not doubted that acts or declarations of either partner respecting partnership property, or within the scope either actual or ostensible of the partnership business, are admissible. *Vide opinion of Chancellor in Bogent vs. Hay.*, 9 *Paige, p.* 302.

Again: Admit, for a moment, that the proposition just urged is untenable, the transactions referred to are too remote and disconnected in point of time and circumstances. The doctrine which admits in evidence other contemporaneous fraudulent acts, is but the old doctrine which admits proof of all matters connected with the *res gestæ*. It could not be shown in a case like this, that a man was morally oblique—that he was a cheat—or the like. Contemporary acts or declarations are only admissible when they are so related to the central act in controversy as to be constituent thereof, or as parcel of a series of fraudulent acts. I take the rule applicable to the class of evidence, to be well and completely stated in the case of *Aplharp vs. Comstock*, 2 *Paige*, 482. The Chancellor lays down the rule substantially in these words: "When a fraudulent combination is established, the acts and "declarations of any of the parties thereto, may be proved "against the others; but only such acts and declarations as "constitute a part of the *res gestæ*." *Vide* 2 *Paige*, 482; *also* 2*d Ed. Burrill on Assign. pp.* 422 *&* 442; 3 *Cowan, Edw. & Hill notes, p.* 690; 1 *id., pp.* 185, *&c.;* 2 *id., pp.* 564, *&c.; Vine vs. Winter*, 8 *Dana*, 247.

If the acts of Cazeau respecting his separate property are admissible at all without involving an absurdity, I can see how, by a stretch of the rule we have been discussing, the deed from Cazeau and wife, of 5th Feb., 1857, might possibly be

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admissible; but how it became material to show how and when and for how much Guerin disposed of the property afterwards, passes my comprehension.

Guerin conveys part of the property, 19th Feb., 1857, to Geo. Hadfield—in 1858 he conveys another portion to Rossiter, and in 1859, the balance to Ebenezer Ingalls. What of it? Counsel stated that his object was to show that Cazeau was the beneficial owner of the property; that the original conveyance was for his benefit, &c. If it proves anything, it proves just the opposite state of facts.

The Court will observe that this trial might about as well have been lumbered with the entire records of Ramsey County. That such a mass of testimony as was introduced in a case of this character, must have prejudiced the Plaintiff, is easy to see; and that it did so, I have felt.

Again; laying out of view the objections I have urged; insufferable as I believe the reception of the testimony of Cazeau's acts, to wit, that they are the acts of one of the partners, relating to his distinct property not contained in the assignment, and also that they are too remote and disconnected with the acts in controversy, it is submitted that in no case are the fraudulent acts of a partner admissible to characterize a transaction in which all the members unite, unless privity is shown in the others.

III.—I will next classify as being of the same general character, the testimony found in folios 169, 172–3–4, 185–6.

The witnesses were allowed to answer, in these folios, substantially as to how much money had been received for sales made of the goods, after the assignment and before the attachment; whether anything of the amount realized had been paid over, and whether the creditors of Bartlett & Cazeau had been notified by the Assignee, of the assignment.

There is nothing better settled than that acts subsequent to the assignment cannot be used to avoid it. *Burrill.*

It is equally well settled that the misconduct of the Assignee, although it may subject him to removal, and entitle the creditors to the appointment of a Receiver, cannot operate against the integrity of the deed. Here the assignment was made Feb. 25th, 1857, the attachment about the 10th of May,

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1857. Possession had been taken and certain of the property sold. What materiality was then in proof how much money had been received in these few days? What in proof that no dividend had been made amongst creditors pending the litigation? or what in proof that no notice had been given? This testimony was calculated to injure the Plaintiffs' case, and its reception was clearly error. This Court has decided the principle here asserted in *Murray vs. Grace.* (*not reported.*)

IV.—The testimony of John B. Sanborn, and the deed to Cummings, Seaman & Co., (folio 186, &c.) is only adverted to for the purpose of calling the attention of the Court to what we believe manifest error in the exclusion of testimony to prove the actual value of the property, (*vid.* fol. 208.) We have given one reason in this connection *supra.*

X.—The testimony of the contents of the letter elicited from the witness Dufresne was improperly admitted (see fol. 199-200.) There was no foundation laid. The rule is that the very best evidence of diligence should be given to admit of secondary evidence of this character. Mr. Dufresne speaks of the receipt of the letter—says he has not got it—and don't know where it is. It does not appear that he made any inquiry for the letter. *Vide* 2 *Edwards' Notes, pp.* 564-5.

VI.—We object to the charge of the Court below, found in folio 207 of case, for this reason: the obnoxious charge was, substantially, that if the Assignors knew at the date of the assignment, that the Assignee was incompetent, it was evidence from which the jury might find the assignment made with intent to defraud.

This was tantamount to instructing the jury, that the facts proved and unexplained, avoided the assignment as a legal conclusion. We then ask, would the acts admitted avoid an assignment fair on its face? We concede, that such being the fact, it would be evidence proper for the consideration of the jury, in connection with other circumstances showing the integrity of the deed. The charge given in these terms, was calculated to mislead the minds of the jury as to the weight to be given to the evidence. It did in fact mislead that *intelligent body!*

VII—The Court below erred in refusing the request of

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Plaintiff's counsel, found in folio 226-7 of case, being 2d & 3d request of Plaintiff. These requests were, in substance, that, 1st. The assignment was a copartnership assignment of partnership property only. 2d. That it did not purport to convey individual property, but left such property subject to the debts of the respective owners of the property.

I have already discussed the character of the assignment, and have considered it with reference to the proof admitted of the distinct acts of Cazeau respecting his separate property.

There is still another view in which the refusal under consideration was erroneous. In this connection, for the purpose of the assignment, I will for a moment concede that Cazeau's acts relating to his separate property, were admissible. These refusals were none the less erroneous and calculated to mislead, if the Court was wrong in refusing to treat the assignment as a copartnership deed of specific or copartnership property.

It the assignment was general, of all property, the fact that one of the partners had shortly before transferred a portion of his separate estate, would have much greater significance than it would if the assignment related only to partnership property. The assignment might in the one case be regarded as one of a series of similar acts touching the same class of property, and not an independent act treating with a distinct kind of property.

VIII.—The request of the Plaintiff, found in folio 228-9 of case, has already been discussed. *Vide fol.* 230-31.

IX.—It appears to me that this request of Plaintiff's counsel stated precisely what the books mean. A man may not be able to "read, write and cipher," and may still be one of the best and safest business men in the community. This very Plaintiff, with his splendid fortune, his well recognized honesty, and caution in all business affairs, furnishes an apposite illustration.

The fact of competency is only to be considered as it affects the intent of the Assignors. If Plaintiff was selected of known incompetency, with a view to his control by the assignors, by reason of his imbecility, then, and in no other conceivable case, could the intent be characterized by proof of this character.

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The views here suggested are made more apparent and the error of the Court below more conspicuous, in the 6th request [folios 231-2-3-4] refused.

There was more obvious error, if possible, committed in the charge actually given under the sixth request of Plaintiff. The Court in effect charged that insolvency raised a legal presumption of fraud in the Assignors.

X.—We believe the Court erred in refusing the Plaintiff's seventh request, in folio 236. It has been held over and again, that the employment of the assignors will not invalidate the assignment, for the reason that in most cases they are the best acquainted with the affairs of the firm, and most competent to close them up.

XI.—We believe the Court erred in refusing to grant the eleventh request of Plaintiff's counsel, found in folios 238-9.

We have already seen by authorities cited, that subsequent acts of either the assignors or assignees cannot be used to invalidate the deed, unless they are so related to the circumstances surrounding the instrument as to connect themselves directly and inextricably with it.

If Cazeau or either of the assignors, were found meddling with or carrying off portions of the assigned property, with the knowledge or consent of the assignees, such evidence would be admissible, as tending to show that such might have been the understanding with which the instrument was executed.

A fraud upon the assignee—a larceny of the assigned goods by either of the assignors—could, certainly, be no evidence of the bad intent of the instrument itself.

Points and Authorities of Respondents.

II.—The question propounded by the Defendant's counsel to the Plaintiff, Vetal Guerin, when examined as a witness for the Defendants, "Did Cazeau convey to you by warranty deed, for a consideration real or pretended of $7000, some lots on 9th street in the city of Saint Paul, on the 5th day of February, 1857?" and the answer of the witness thereto, were properly allowed by the Court. And the deed referred to in

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the witness' answer, from Cazeau and wife to the Plaintiff of the same lots on 9th street, bearing date on the 5th day of February, 1857, was properly received in evidence.

Also, that the Plaintiff sold and conveyed a portion of the same property on the 19th day of February, 1857, by deed to George Hadfield for $1000. And the deed from the Plaintiff to Hadfield was competent evidence in the chain of testimony and was properly received.

Also the evidence of the sale and conveyance by the Plaintiff of another portion of the same property which Cazeau had conveyed to him, to one Thomas Rossiter, on the 25th of June, 1857, for $2000, and the deed of the same from the Plaintiff to Rossiter, was competent evidence and properly received in connection with the other evidence given by the Defendants.

Also the evidence of the sale and conveyance by the Plaintiff of the remaining portion of the property deeded to him by Cazeau and wife on the 5th of February, 1857, and the deed of the same to Ebenezer Ingalls on the 8th of August, 1859, for $2600, was properly received in the connection and relation it had with the other facts in the case.

The question propounded to the witness Guerin, viz: "Did you pay Cazeau anything for the lots he conveyed to you on the 5th of February, 1857?" and the answer of the witness thereto, contained in *folios* 161 *to* 166 *inclusive*, was competent and material testimony upon the question of good faith, and the intent with which Cazeau, at least, one of the assignors, made the assignment, and that the assignee Guerin knew of the fraudulent intent when the assignment was made. The record of the deed of conveyance from the Plaintiff Guerin to the wife of Cazeau, dated the 20th day of September, 1858, consideration $4000 expressed in it, conveying to Mrs. Cazeau lots 3 and 4 in Block 5 in Roberts & Randall's addition to St. Paul, and the subsequent deed from Cazeau and his wife, dated August 8, 1859, to the Plaintiff Guerin, reconveying the same lots to the Plaintiff, for the expressed consideration of $3000, (*folio* 167) were properly admissible evidence, connected with, and explanatory of the conveyance from Cazeau and wife to the Plaintiff on the 5th of February, 1857. That conveyance was the consideration for the subse-

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quent deed from the Plaintiff to Cazeau's wife of the two lots, September 20, 1858. And the deed of the same lots from Cazeau and wife back to the Plaintiff, on the 8th of August, 1859, was a part of the same transaction, and in consideration that the Plaintiff would pay Cazeau $1600, in cash, out of the proceeds for which he had sold the property conveyed to him by Cazeau, February 5, 1857, instead of allowlowing Mrs. Cazeau to keep the two lots.

Let us examine the facts attending these conveyances, and their bearing and materiality as evidence upon the question of the intent and good faith with which the assignment was made.

Firman Cazeau and Louis Bartlett, Jr., made a general assignment purporting to assign all their property, real and personal, to the Plaintiff as assignee, in trust for the benefit of their creditors, and payment of their debts, on the 23d day of February, 1857.

On the 5th day of the same month, only eighteen days before the assignment, and on the very eve of making the assignment, at a time when they are presumed to have known all about their own circumstances, the amount of their property, the debts they owed, their solvency or insolvency, Cazeau, one of the assignors, conveys by warranty deeds, real estate which he owned in the city of Saint Paul, the legal title to which was in him, and which was at the time subject to the attachment or execution of his creditors, and which was then considered by the parties worth $7,000, to the Plaintiff, without the payment of any consideration whatever. For the Plaintiff swears that he "paid nothing for the deed from Cazeau, but agreed to pay something." He then says he was to pay him two lots near the Capitol, including a brown house, or three, or three and a half lots on 11th street, on the corner of St. Peter street, he was to give him one of those pieces of land, provided the Plaintiff also had to pay the mortgage then held by Dr. Borup upon Cazeau's property for $3,000. The value of the two lots with the house near the Capitol, or of the three and a half lots on 11th street was agreed upon at $2,500. Cazeau agreed to bring his wife to see them, and select one piece of property or the other. The

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Plaintiff says it laid in that way a year or so, before Cazeau determined which he would select, and he then finally elected to take the two lots near the Capitol, and on the 20th of September, 1858, the Plaintiff made the deed of those two lots to Cazeau's wife, and this was more than a year and a half after the assignment, and the sole consideration was the property conveyed by Cazeau to the Plaintiff, a few days before the assignment

Then out of the moneys arising from the sales of the property Cazeau had conveyed to him, the Plaintiff says he paid the mortgage of $3,000 and interest to Dr. Borup. And this, it is to be observed, was all paid after the assignment was made.

On the 19th of February, only four days before the assignment, the Plaintiff sells and conveys a portion of the property received from Cazeau to Hadfield for $1,000 in cash. On the 25th of June following, he sells and conveys another portion of the same property to one Rossiter for $2,000 in cash. And on the 8th of August, 1859, he sells and conveys the remaining portion of the same property to Mr. Ingalls for $2,700 in cash. Thus receiving in cash an aggregate sum of $5,700 for the property. And all this is done before the terms and conditions of his purchase of the property from Cazeau is definitely fixed. For on the 8th of August, the same day he makes the last sale and deed to Ingalls for $2,700, we find him paying $1,600 of that money over to Cazeau, and Cazeau and his wife, on that day convey back to the Plaintiff the two lots and brown house, which he had before conveyed to Cazeau's wife. And all these transactions relate back to and are founded upon the consideration of the property conveyed by Cazeau to the Plaintiff a few days before his assignment.

Is it not a fair inference from these facts that he conveyed this property to the Plaintiff in view of making the assignment, that he conveyed it to avoid assigning it for the benefit of his creditors, or the creditors of Bartlett and Cazeau, for it was liable to be attached for their debts; that he conveyed it to put it beyond the reach of his creditors.

Not a dollar of consideration had been paid by the Plaintiff for it, when the assignment was made, and on the eighth of

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August, 1859, we find the Plaintiff paying Cazean $1,600 in cash, the proceeds of this very property.

Does not the conclusion inevitably follow that the property was held, and intended to be held by the Plaintiff, in trust for Cazeau, and for his sole benefit, and this secret trust, thus created on the eve of the making of the assignment, is certainly competent evidence for the jury to consider in determining the intent of the assignors in making the assignment; and the only possible mode of proving the existence of this secret trust, was by proving the different acts and means used in carrying out and consummating it. What disposition the Plaintiff made of the property, and to whom he paid the proceeds; because these acts relate back to, and are the natural offspring of, the object and intent of the parties, existing at the time the property was conveyed to the Plaintiff, and is the best evidence of the purpose and intent for which it was placed in his hands. *See Burrill on Assign. ch.* 33, *p.* 413; 2 *Sanford, p.* 594; *Filder vs. Day et al.;* 1 *Greenleaf's Ev, p.* 71, *sec.* 53; 53; 1 *Sanford's Chan. Rep, p.* 334, *Cooke vs. Smith et al.* 1 *Phillipps' Ev. Cowans., Hill & Edwards' Notes, pp.* 202, 203, *and* 204, says:

It is a question for the Court in each case to consider whether the declaration or act proposed to be received, does or does not come within a reasonable time of the disputed act; and for this purpose the Court will inquire into the existence of any connecting circumstances between the declaration and the act of bankruptcy. The rule is not confined to the precise act in question.,

4 *Minnesota Rep. p.* 405, *Filley et al. vs. Register.* The Court says: "There is no possible way of proving the motives which actuate men in the affairs of life, save by proving their acts, and all the concomitant circumstances, and from them deducing the motives, upon principles which observation and experience have taught us rule human conduct."

It makes no difference whether the secret trust in favor of the assignor appears on the face of the assignment or exists by any other arrangement between the assignor and assignee, made in contemplation of the making of an assignment, it is equally fatal.

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In the first instance, if it appears on the face of the assignment, it is void in law, and it is the duty of the Court to pronounce it so.

In the second, if it appears from extrinsic evidence, then it is a question of fact for the jury to determine. 6 *Hill, p.* 438, *Goodrich vs. Downs;* 11 *Wendell,* 187, *Grover vs. Wakeman.*

3d. The several questions put to the witness, Guerin, by the Defendant's counsel, (in folios 169, 170, 171, 172, 173, 174 and 175,) were properly allowed by the Court. Three years had elapsed from the time of the assignment to the time of the trial, and it was competent and proper to inquire what disposition the assignee had made of the assigned property; to ascertain if he had acted under the assignment, and also in view of showing, as the Defendants claimed to be the fact, that considerable portions of the property had been secretly removed from the store to different places of deposit, and finally into possession of the assignors; and this was a fact in connection with the other evidence, which went to characterize the intent with which the assignment was made.

And the inquiry whether the assignee had ever given any notice of the assignment having been made, to any of the creditors, after the lapse of three years, especially in view of the fact that most of the creditors resided in Eastern cities, was clearly a material inquiry, as was also the question, whether he had ever paid over any of the proceeds of the assigned property to any of the creditors, upon the question of the competency and qualifications of the assignee to perform his trust, which is a point we shall hereafter consider as evidence of the intent of the assignors, in selecting an assignee who was wholly incompetent to perform the trust.

But it becomes wholly unnecessary to consider the propriety or impropriety of the first four questions, as contained in folios 169, 170, 171 and 172, or the ruling of the Court in allowing them to be put, because they were all answered in the negative, and the answers given rendered the questions wholly immaterial, and the Plaintiff could in no way be prejudiced by them, and cannot now complain of their competency or incompetency, because the answers removed the objection, if any existed.

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The questions of the Defendant's counsel contained in folios 186 and 187, and objected to, were material and proper inquiries upon the question of the incompetency and unfitness of the assignee, to show how he had managed and conducted the business under the assignment.

The deed from L. Bartlett, jun., one of the assignors, to the creditors, Cummings, Seaman & Co., of the one undivided half of the store and lot in Faribault, executed on the 20th of February, 1857, in payment of $2,500 of their debts, was properly received in evidence, and was material to show that when Bartlett & Cazeau made their assignment on the 23d of February, and stated their indebtedness in the schedule to Cummings, Seaman & Co,, to be $5,555.25, and made them preferred creditors for that whole amount, they had, in fact, paid $2,500 of that same indebtedness, by the sale and conveyance of the Faribault store and lot to Cummings, Seaman & Co., only three days before the assignment, and were then, by their assignment, stating and preferring the payment of a fictitious debt, to that extent in fraud of their other creditors. See folios 197 and 198.

IV.—The 5th and 6th instructions requested by the Defendant's counsel, and given to the jury, were correct and properly given.

The fifth predicated upon the utter incompetency of the assignee to perform the trust, and the assignors' knowledge of that fact—if the jury should so find—at the time the assignment was made.

The sixth assumes, that certain facts there enumerated, and which the law denominates badges of fraud, are circumstances from which the jury may find that the assignment was executed with intent to hinder, delay, &c.

In other words the instruction informs the jury of the legal effect of certain acts when connected with an assignment, and the light and character in which the law regards them, their effect as legal evidence.

The ninth instruction requested by the Defendant's counsel and given by the Court, is in the language of the statute, and may therefore be presumed to be correct.

V.—The Court did not err in refusing to give the 2d, 3d,

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and 4th instructions requested by the Plaintiff's counsel. Because these instructions assumed the fact, that the assignment was only a partnership act and covered and assigned only the partnership property of the assignors, and not their individual property, while the assignment, upon its face, shows that it was executed individually and separately, by the assignors, Lewis Bartlett, jr., and Firman Cazeau, as their individual acts. Their full names each, are inserted in the body of the assignment as parties of the first part.

The language of the instrument assigns and conveys all and singular the lands, tenements and hereditaments of the parties of the first part, and all the goods, chattels, wares, merchandize, bills, bonds, notes, book accounts, claims, demands, judgments, choses in action and property of every nature and description of the said parties of the first part, without any reservation or restriction whatever, and there is no reference made in the assignment to the partnership property of the assignors, and nothing in it indicating that partnership property only, is intended to be assigned. By its terms it assigns all the property real and personal of the assignors, of every nature and description. It clearly conveys and was intended to convey all the individual property of the assignors, and the law gives it that construction. *Burrill on Assignments, page* 348; 2*Sergeant & Rawle, page* 178, *Wharton vs. Fisher;* 17 *Vermont, p.* 390, *Dana vs. Lull;* 2 *Hilliard on Real Property, page* 339.

A deed is always construed most strongly against the grantors, yet the language must control. As a strong circumstance, to show that the assignors understood and intended it to be an assignment of their individual property, the store and lots in Faribault, which was the individual property of L. Bartlett then, and the undivided half of which he had sold and conveyed to Cummings, Seaman & Co., only four days before, was put in the schedule of assetts. *Folio* 54.

VI.—The Court properly refused to give the 5th and 6th instructions requested by the Plaintiff's counsel. See folios 230, 235, 232 and 234, and did properly instruct the jury, that if they found that the assignee was an incompetent person to execute the trusts created in the assignment, it would be a

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fact from which the law presumes a fraudulent intent in the assignors, and it was for the plaintiff to disprove that presumption.

VII.—The qualification which the Court made to the 9th instruction requested by the Plaintiff's counsel, was correct, and the refusal to charge in the language of the request, was correct.

The 11th instruction requested by Plaintiff's counsel was properly refused; because it sought to take from the jury and to withdraw from their consideration, a fact which was material and proper for them to consider in connection with other evidence in the case, upon the question of the intent of the assignors and good faith of the assignment.

VIII.—The Plaintiff was an improper person, and admittedly incompetent, to execute the trusts under the assignment, which the assignors well knew when the assignment was made, and the selection of such a person for assignee is presumptive evidence of the fraudulent intent of the assignors, which renders the assignment void. *Burrill on Assignments*, 61, 62, *and* 63.

In that case there were three assignees, but the Court held that one of them was disqualified from properly attending to the discharge of the duties of the trust, by reason of his residing in Philadelphia, the assigned estate being in New York. That the second was disqualified from blindness, although he was proved to be a man of sound judgment, and capable of advising in the disposition of property; and that the third was incompetent to act, because he was illiterate, and could not read or write, although he was shown to be an active man, and in other respects competent to take charge of the business.

The Court say, "The effect of such an assignment was manifestly to throw the management of the property into the hands of irresponsible agents, or to keep it within the control of the assignor," and upon the sole ground of the incompetency of the assignees, pronounce the assignment void. 4 *Dal. Rep. p.* 76, *Burd vs. Smith;* 8 *Paige Ch. Rep., p.* 417, *Reed vs. Emery;* 2 *Sanford's Ch., pp.* 353-4-5, *Currie & Currie vs. Hart et al.;* 1 *Barb. p.* 214, *Connah vs. Sedgwick.*

Again, the Plaintiff testified that he kept his brother-in-law

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to do his private business, to do his writing and keep his accounts; that his brother-in-law had done so for six years; he says he can't keep accounts; that he does not write his name; he reads French a little in print, but not in writing; can't add up figures; and cannot get along without some one to do his own writing; that he could not get along in his own business without his brother-in-law; he cannot read any English, and has no education. He says some years have twelve months and some less; sometimes there are fifty-four weeks in a year; some years have more weeks, and some less. He was examined through an interpreter in the French language; and all his deeds given in evidence have the sign of the cross.

Such was the melancholy evidence the Plaintiff gave of his qualifications and competency to discharge the duties of the trusts reposed in him under the assignment.

The assignment and schedules show that the personal property assigned amounted to $31,698.00, consisting of $27,581.00 of merchandise, $3,992.00 debts due the assignors, and $125.00 of other personal property, exclusive of the real estate in Faribault. The Plaintiff says he took possession of all this property immediately after the assignment, and his brother-in-law and clerks commenced selling it. Three years had passed from the time of the assignment before the trial, and yet the plaintiff swears that he had never given any notice of the assignment to the creditors, most of whom resided in Eastern cities.

He says he never paid any of the proceeds of the assigned property to the creditors; that he does not know what amount of property was assigned to him; and don't know what the amount of the proceeds is now in his hands.

And how should he know? He could not superintend the taking of an inventory of the property, or read a word of it after it was taken. He could keep no account of the sales of the property, or proceeds realized, or of the expenses incurred in the business, nor could he read an item of the account kept by others. He was entirely dependent upon agents in no way responsible to the creditors for the faithful performance of the trust, compelled to rely upon what they told him in relation to the business, without any possible means of

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knowing the truth of their representations. All of which confirms the entire incompetency of the assignee to discharge the duties of the trust.

IX.—The assignors by their assignment made an illegal and fraudulent preference of their whole alleged indebtedness $5,555,25 to the creditors Cummings, Seaman & Co., when in fact $2,500 of the same indebtedness had been paid a few days before making the assignment, by the sale and conveyance of the Faribault store and lots. Thus by the terms of the assignment, they stated and preferred the payment of a fictitious debt, to the amount of $2,500, which renders the assignment illegal and void as to the other creditors. *Burrill on Assignments, p.* 135.

The writer says: "The preferring a fictitious debt, in an assignment for the benefit of creditors, will have the effect of rendering the assignment void." 2 *Barb. Sup. Ct. Rep. page* 10 *&* 11, *Webb vs. Daggett.*

In this case before making his assignment, the assignor had confessed a judgment without consideration, which was placed in the first class of preferred debts in the assignment, and upon that ground alone, the assignment was held to be fraudulent and void. 2 *Sanford* (*Superior Court*) *page* 594. *Case of Ziedler vs. Day et al.*

It was held that a provision in the assignment for the payment of a fictitious debt, is not only void but has the effect of rendering the assignment void *in toto*, because it is evidence of the fraudulent intent of the assignor. And the uniform construction of the Courts has been that a deed void in part, as being in violation of a statute, is void *in toto.* 5 *Cowen, p.* 547; *Mackie vs. Cairns;* 11 *Wendell, p.* 187; *Grover vs. Wakeman.*

Burrill on Assignments, 136, 4 *Sanford, page* 79, *Breck vs. Cole.*

In the case at Bar, the indebtedness of the assignors to Cummings, Seaman & Co, is stated in the schedule of debts annexed to and made a part of the assignment, to be $5,555.25, the payment of which is first preferred over the other debts. The witness, Mr. Sanborn, swears that he was in Cummings, Seaman & Co.'s store in New York, the day they received

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news of their claim against Bartlett & Cazeau; they stated to the witness that their claim against Bartlett & Cazeau was about $5,000, and informed him that a payment had been made upon it in real estate, that Bartlett & Cazeau stated in a letter that Cummings, Seaman & Co. had just received from them by mail, and which the witness then saw and read, that they had conveyed real estate in Faribault to Cummings, Seaman & Co., for $2,500 of their debt, and which was worth that sum. This was the last of February or first of March, 1857. That Cummings then said that their claim against Bartlett & Cazeau was about $5,000, and the conveyance had been made to them in part payment of it. Folio 197.

The deed given in evidence from Louis Bartlett, jun., to Cummings, Seaman & Co., was executed on the 19th, and recorded on the 20th day of Feb., 1857; the consideration, $2,500, an absolute conveyance by its terms, containing the usual covenants of warranty. Folio 198.

The witness, Mr. Sanborn, further testifies that he paid Cummings, Seaman & Co. $50 rent for the occupancy of the store while the goods were in it under the attachment; that this claim for rent was made by them in June, 1857. See folio 199.

The statements made to the witness by Cummings, the senior partner of the firm, after they had received information of the conveyance, that it had been made to them in part payment of their claim, and their subsequently demanding and collecting the rent of the store, several months after the conveyance, clearly establishes the fact that they accepted the deed and received the property as a part payment of their claim. Upon this fact the evidence was uncontradicted—there is no attempt made by the Plaintiff to show that it was not accepted by Cummings, Seaman & Co. as a payment—no pretence that it was received in any other manner or for any other purpose; but their statements are that it was in part payment. And a few months after they exercise their rights of ownership over the property by demanding and collecting rent.

X.—The property of the assignors at the time of making the assignment, was much more than sufficient to pay all their

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debts and liabilities, if honestly and fairly appropriated for that purpose and so the assignors believed at the time. The whole indebtedness stated in the schedules of the assignment is $23,400.91, and no other indebtedness is stated or shown to exist, either by the assignment and schedules or by the proofs in the case.

It is true that the assignment provides that out of the residue, if any, of the proceeds of the assigned property, after paying all the partnership debts, the assignee shall pay and discharge all the private and individual debts of the assignors, &c.; but the assignment does not state, or even recite that there are any individual or private debts of the assignors. There is no schedule of individnal debts; and there is not a word of evidence in the whole case tending to show that the assignors owed any individual debts, or any debts other than those contained in the schedule. They have given a schedule of their debts forming a part of the assignment, and there is no statement or recital in the assignment, or evidence in the case, that any other indebtedness of any character or amount existed against them; and in the absence of any statement or evidence of such facts, it cannot be presumed; because there are no facts in the case from which such a presumption can arise.

It was a primary duty of the assignors to furnish a full and complete schedule with the assignment of all their debts for the information of the creditors, and in the absence of proof to the contrary, the presumption is that they have done so, and that the schedule furnished does show all their indebtedness of every kind.

The assigned property contained in the schedule to the assignment, consisting of goods, wares and merchandise, according to the valuation of the assignors, put down and carried out at the time, amounted to $27,581.90.

The debts due to the assignors, as contained in the schedule and proved in evidence amounted to $3,992.40. Other personal property of the value of $125. *See* 4, *Minn. Rep. pp.* 310 *to* 317, *Burt vs. McKinstry & Seeley et al. and cases there cited;* 3 *Monroe, page* 1, *Ward vs. Tratter;* 8 *Dana, p.* 247, *Vernon vs. Norton;* 1 *Paige Ch., p.* 305, *Beck vs. Burdett;* 7 *Paige Ch. p.* 163, *Butler vs. Stoddard.*

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The jury are the exclusive judges of the intent with which the assignment was made. They have passed upon all the questions of fact in issue, and their verdict is fully supported by the evidence.

J. B. Brisbin, Counsel for Appellant.

M. E. Ames, with Sanborn & Lund, Counsel for Respondents.

By the Court—Flandrau, J.—This action is to recover the value of certain chattels alleged to have been wrongfully taken by the Defendants from the Plaintiff. The defence is, that the Plaintiff is assignee of Louis Bartlett, Jr., and Firman Cazeau. That the assignment is fraudulent. That the Defendants are creditors of the assignors, and that the taking was for their debt and made under attachment duly issued and levied, &c. Upon the trial the assignment was attacked as being fraudulent in fact, having been made to hinder and delay the creditors of the assignors. The first evidence that was introduced to show the fraudulent intent of the assignors, came out on the cross-examination of the Plaintiff. It was proved that the assignee was illiterate and could not read or write. The selection of an incompetent assignee is regarded in the law as a badge of fraud. The assignor having the choice of his assignee without consultation with, or consent of his creditors, must take care that he appoints a person competent to protect the rights of all parties interested under the assignment. If it appears that the selection of an incompetent assignee was made in order to allow the assignor to control the administration of the estate, then the assignment will be declared void, because such an intent on the part of the assignor would be a fraud upon his creditors. If it should appear that the assignee was incompetent in fact from any cause, but that his selection was not made from any improper motive on the part of the assignor, then the assignee would be subject to removal at the instance of a creditor of the estate, and a proper person would be substituted by the Court to carry out the trust. The assignment would be sustained in such case, because of the absence of the vitiating element in

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its inception, to-wit, a fraudulent intent in the assignor. This intent, however, when it is not apparent on the face of the instrument, is always a question of fact and must be determined by the evidence adduced. It does not necessarily follow that because an assignee is illiterate and cannot read or write, that he was selected by the assignor for that reason, and with the fraudulent design of retaining control of the assigned property; yet if a jury should upon that fact alone so find, it would require a very strong array of counter facts to induce a Court to disturb the finding. And should a jury vindicate the competency of the assignee, and the good faith of the assignor in his selection, notwithstanding his inability to read and write, it would be equally difficult to interfere with the verdict. The question therefore as to the validity of the assignment is upon the intent of the assignor, ascertainable not by any one fact or circumstance, but by every fact and circumstance that may throw light upon the transaction. If the fraudulent intent is sought to be established by proving the appointment of an assignee, incompetent by reason of being illiterate, then any facts may be shown in contradiction of that fact, or its effect may be avoided by proof of a sufficient degree of intelligence and business capacity to justify the choice of the assignee, notwithstanding his want of scholarship; because a man may be fully capable of administering an estate and not know how to read or write, yet we admit that such in our opinion is not very often the case.

In answer to this proof the Plaintiff proposed to show that the assignee was possessed of a large property at the time of the assignment, which he was prevented from doing by the ruling of the Court. There was no charge made by the Defendants that the assignee was insolvent, which fact is generally a badge of fraud; had there been, it would have been competent for the Plaintiff to show the contrary; but it is difficult to see how the proof of solvency could aid the defect of want of education, especially when the presumption is in favor of solvency, when nothing is shown to impeach the assignee in that respect. Blindness in an assignee is regarded as a badge of fraud on the part of the assignor who selects him. *Crane vs. Mitchell*, 1 *Sandf. Ch.*, 251. And so also of

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an assignee who was unfit to attend to business by reason of a lingering disease, which fact was known to the assignor. *Carrie vs. Hart.*, 2 *Sandf. Ch.*, 353; *Burrill on Ass'ts*, 62. Both blindness and sickness stand upon the same footing as badges of fraud, with ignorance, and might be rebutted by appropriate facts showing that their existence in the particular case did not disqualify. Yet proof of solvency could in no manner mitigate these defects. The Court properly rejected this offer.

The Defendants had a right of course to reduce the value of the goods taken in order to lessen the recovery against them. They asked the Sheriff and the Deputy how the goods sold at the sale on the execution. This, although by no means conclusive of their value, was one means of ascertaining it. It was known how much they sold for, and if the witnesses testified it was all they were worth, or nearly so, it shed some light upon the question of value. We see no error in the admission of this evidence. Had the Plaintiff recovered a verdict for less than he claimed the goods to be worth, the evidence given by the Defendants on the question of value might have been material on this review, but as the verdict was against the Plaintiff on the question of fraud, the measure of damages loses its significance.

Whether the execution and return offered by the Sheriff in his justification were admitted or rejected, is impossible to decipher from the paper books furnished the Court. The propriety of the evidence offered and admitted, touching the conveyance of certain property by the assignor Cazeau, to the assignee Guerin, shortly before the assignment, claimed to have been upon a secret trust in favor of Cazeau, depends upon the character of the assignment. If it was strictly a partnership assignment, designed to convey nothing but the copartnership property, then the evidence was not admissible. If on the other hand it was a general assignment of all the property of the assignors, both joint and individual, then an abstraction of so large an amount of real estate immediately previous to its execution by one of the assignors for his own benefit, would be a strong circumstance to prove that the assignment was not made in good faith for the benefit of the

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creditors. If the first conveyance to Guerin of the land was admissible, all the subsequent changes that the land so conveyed went through, and the considerations moving between the parties, were also admissible to characterize the first, and establish the intent with which it was made, or in other words to show whether there was really a secret trust reserved in favor of the first grantor. The assignment executed by the parties in this case was in the form given by Mr. Burrill in his work on assignments, page 582, appendix, under the head of "Assignments by a co-partnership giving preferences." In the beginning they describe themselves as "Louis Bartlett, Jr., and Firman Cazeau, copartners under the name, style and firm of Bartlett & Cazeau, of the first part." They say they are indebted and desirous of making a fair and equitable distribution of their property and effects among their creditors. They then sell and assign to the party of the second part, his heirs, &c., "all and singular the lands, tenements and hereditaments of the said parties of the first part, situate, lying and being in the Territory of Minnesota, and all the goods, chattels, wares, merchandize, bills, bonds, notes, book accounts, claims, demands, judgments, choses in action, evidences of debt and property of every nature and description of the said parties of the first part, of which said lands and property aforesaid a schedule will be hereto annexed marked 'A,' and also all the books of accounts of the said parties of the first part, and all papers, documents and vouchers relating to their business dealings or property." The assignment then creates a trust for the creditors of the partnership with preferences. Next, the individual creditors. Next, surplus if any to themselves. It is signed and sealed by each of the members of the firm with his own name. There is a schedule of the property intended to be transferred annexed, which enumerates the property specifically, and contains no words of general import indicating that any other than the specific property mentioned was designed to be passed.

It is a general rule in the construction of assignments containing general words of transfer, such as all the debtors' property, that subsequent words of description or a reference to a schedule as setting it forth particularly will operate to

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limit the general clause of transfer, and nothing will pass that is not set forth or specified. *Burrill on Ass'ts*, 327, 244-5-6, *and cases there cited.* Nor does any presumption arise from such an assignment that it is a general one. *Id.*, 244-5; *Wilkes vs. Ferris*, 5 *John.*, 335. It was perfectly competent for these partners to make an assignment of their partnership property alone, reserving their individual estates, which would be liable to seizure for their firm debts at any time; or they might have assigned their partnership property, and put into the same instrument portions of their individual property without its being a general assignment or subject to the rules applicable to such instruments. One of the partners did in fact put into the schedule the individual half of the store in Faribault, which was the individual property of Bartlett. We think the assignment was not a general one, but was an assignment of the partners in their associate capacity, and was not to be affected by the acts of the individuals in relation to their separate property.

The Defendants had the right to inquire of the assignee all about the manner he conducted the business under the assignment, as to moneys received, notice given to creditors, &c., if for no other purpose, to test his business capacity in connection with the charge of his ignorance. There was no error in admitting the evidence of this nature. The same is applicable to the witness Demules. He transacted the business for the assignee, and the Defendants might question him concerning all these matters to see whether the assignee had stated them correctly. The assignee was the Plaintiff's witness, and as the enquiries were material he might be contradicted, if not for impeachment, at least to show by his ignorance of the business intrusted to him his incapacity to transact it.

The deed from Bartlett, Jr., to Cummings, Seaman & Co., was properly admitted to show a payment on their debt. If the debt of this firm had been paid in whole or in part, the Defendants had a right to show it, as it is always a badge of fraud to insert debts in the schedule that are not owing by the assignors, and give them a preference.

The Plaintiff offered to prove the value of the property so

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conveyed, in order to show that it was worth much less than $2,500, the amount named in the deed. The competency of this proof would depend altogether upon the fact whether the creditors had agreed to receive the land at the stipulated sum of $2,500, or merely took it in part payment to the extent of its real value. The mere fact of the consideration in the deed being stated at $2,500, would not be conclusive that it was agreed to be taken for that sum. The testimony concerning the transaction is very meagre, as presented in the paper books. Mr. Sanborn testified that he had a conversation with one of the firm of Cummings, Seaman & Co., and that he said their claim was about $5,000, and that a payment had been made upon it in real estate of $2,500. The conveyance had not then been received by Cummings, Seaman & Co. The inference to be drawn from this testimony is that it was taken at the agreed amount, as the member of the firm did not speak from the deed, but from some previous arrangement that had been made between the firm and Bartlett, or Bartlett & Cazeau. The testimony was therefore properly rejected.

The Court clearly erred in allowing the witness Dufresne to give the contents of the letter received by witness from Louis Bartlett, Jr., a few days prior to the date of the assignment. No foundation whatever was laid for the admission of secondary evidence of its contents. The witness simply stated that he had not the letter then, and did not know who had it. That he had not seen it since he left Faribault, on the 27th of February, 1857. That the letter was put among the letters pertaining to the business of the store. That as near as he could remember he left it there when he came away, and that he did not know where to look for the letter. It does not appear that the slightest effort had been made to find it, either by search or inquiry. Proof of its contents should, under this state of the proof, have been rejected.

The second, third and fourth requests of the Plaintiff to the Court to charge the jury, were based upon the theory that the assignment was the joint act of the firm, and not a general assignment of all the property of the assignors, and should have been given as requested.

The fifth request was also a correct statement of the law

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concerning an assignee who is charged with incompetency by reason of want of education, which we have discussed above.

The charge of the Court given under the sixth request of the Plaintiff was not erroneous, in telling the jury that a fraudulent intent was to be presumed from the appointment of an incompetent assignee, and that the Plaintiff must rebut the presumption, because the whole charge must be taken together and with reference to the facts proved. The Court had previously charged that if the assignors had been informed by the assignee of his want of education and incompetency to execute the trust, and they had appointed him, well knowing all these facts, that it was evidence from which they might find the assignment was executed with intent to hinder and defraud creditors. Taken together, they contain the element from which a fraudulent intention would be inferable, to-wit, a knowledge in the assignors that they were appointing an improper person. The Court would have been less liable to misapprehension had it reiterated that fact in the charge under sixth request of the Plaintiff, but the omission of it was not error.

The ninth request of the Plaintiff was properly corrected by the Court. The employment of the assignors, and their continuance and connection with the business, is always a fact to go to the jury for what it is worth. It may be innocent or not, according to the developments in the case. In this case it was highly proper that it should go to the jury.

The eleventh request was properly refused. The removal of goods from the store by the assignors after the assignment, did not depend wholly upon its being with the consent of the assignee to make it evidence against the assignment. It would be proper upon the question of the competeney of the assignee to protect the trust property, unless perhaps the taking was a larceny.

There should be a new trial of the cause.

[Judge Palmer, of the 2d District, being interested as a party in the cases arising under this assignment, Judge Vanderburg, of the 4th District, presided upon the trial in the Court below.]

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WILLIAM L. BANNING *et als.*, Appellants, *vs.* SAMUEL C. EDES, Respondent.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

P sold to B, certain real estate, and executed a deed for the same, which was delivered to a third person to be held until B should execute a mortgage for part of the purchase money. The mortgage was subsequently executed by B, bearing date several days after the deed, though both were delivered at the same time. Previous to the execution of the deed and mortgage, a judgment had been docketed against B in the same County in which the real estate was situated, and was then unsatisfied. *Held* That the deed and mortgage were to be considered as parts of one and the same transaction, and that the lien of the mortgage took precedence to that of the judgment.

The date of a deed or mortgage is only presumptive evidence of the time of delivery, and this presumption may always be rebutted by proof.

Judgment creditors (previous to the statute of 1858) are not in equity regarded as *bona fide* purchasers, and entitled to the consideration which equity gives them, when they become such without notice, for a valuable consideration actually paid; but they are looked upon simply as proceeding *in invitum* to enforce their legal demands, and are not entitled to the same favor as a purchaser, whose right may be enforced through the conscience of the other party.

This action was brought in the District Court of Ramsey County, to foreclose a certain mortgage executed by D. A. J. Baker and wife, to one Charles W. Pairo,—the Plaintiff claiming under an assignment of said mortgage. The Defendants, Banning and Knox, interposed answers, claiming title under a judgment against Baker, and which title they claim takes precedence of Plaintiff's mortgage.

It appears that on the 5th day of June, 1856, Pairo owned the land in fee, and on that day entered into a contract of sale therefor with said Baker, upon the conditions of said Baker paying therefor the sum of $1358.33, as follows: $459.44 in cash, upon the delivery of the warranty deed, the balance in two promissory notes, to be signed by said Baker, and secured by a mortgage upon the property. Pairo and wife signed, sealed and acknowledged a warranty deed for the property, dated June 6th, 1856, and the same was thereupon delivered to one Emmerson, to be held by him until said Baker complied with and performed the conditions of the contract of sale. There were no subscribing witnesses to the deed, and it was not witnessed or attested in any manner.

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It remained in Emmerson's possession until June 16th, 1856, when the said Baker and wife, having executed the mortgage, and said Baker having made the cash payment and the two notes, the warranty deed was delivered to him by said Emmerson, who then received the cash, notes and mortgage, in complete fulfillment of the contract of sale. The warranty deed was filed for record on the 21st day of June, 1856, at eleven and a half o'clock, A. M., and the mortgage in fifteen minutes thereafter, and Baker entered into possession of the property.

On the 9th day of April, 1855, the Bank of Hallowell recovered a judgment against said Baker, which was then duly docketed in the county of Ramsey, where said lands were situated.

On the 27th May, 1857, an execution was issued and levied upon the lands described in the mortgage, and the property afterwards duly sold as the property of said Baker. The Defendants, Knox & Banning, claim under the purchasers at sheriff's sale. As conclusions of law, the Court below found that the title to said premises did not pass from Pairo and wife to Baker until the actual delivery of the deed on the 16th June, 1856; that the execution of the said mortgage upon the premises, in accordance with the contract of sale, and as a condition precedent to the delivery of the said deed, had the effect to give said Pairo a first lien upon said premises, as against all judgment creditors of said Baker, whether prior or subsequent. That the lien or claim of the Defendants, Knox and Banning, and the other Defendants named, is subsequent to the lien of said mortgage and subordinate thereto: and thereupon the usual decree of foreclosure was granted to the Plaintiff. The Defendants appeal from the judgment.

Points and Authorities for Appellants.

1. A purchaser under a Sheriff's title, who has placed his deed on record, is equally protected as any other purchaser under our registry laws, and takes title from the judgment lien. *Jackson vs. Chamberlain*, 8 *Wend.* 620; *Jackson vs. Dubois*, 4 *Johns*, 220; 1 *Hill. on Mort.* 665.

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2. The lien of the judgment would attach "*eo instanti*," when the title vested in Baker, which was prior to the mortgage, however short the time, and whether the title was equitable or legal under our statutes. *Comp. Stats. Minn. p.* 566; *Definition of the word "lands" and Real Estate, ibid p.* 114; *and see construction of these words, Blair vs. Stewart*, 2 *Iowa*, 381; *Corkhuff vs. Anderson*, 3 *Binney*, 13.

3. If the deed, (by the omission of witnesses) was insufficient, Baker was still the equitable owner, having complied with the terms of purchase, and being entitled to possession, &c. *Sec.* 3, *chap.* 32, *Comp. Stats., p.* 383; *Jackson vs. Town*, 4 *Cow.*, 599, 601; *Jackson vs. Bateman*, 2 *Wend.*, 570; *Jackson vs. Walker*, 4 *Wend.*, 462; *Corkuff vs. Anderson*, 3 *Binney*, 13; and his title would therefore be bound by the judgment lien. See authorities before cited.

4. The grantor having executed covenants of warranty, is estopped from claiming against it. 1 *Greenleaf on Ev., sec.* 24, and authorities cited.

5. The deed being acknowledged, dispensed with further probate under our statute, and therefore subscribing witnesses were not essential. *Sec.* 1, *chap.* 35, *Comp. Stats.*, 397; *sec.* 8 *ibid, p.* 398; *sec.* 14, 399; *sec.* 26, *p.* 400. *ibid.*

6. The Plaintiff here claims under Baker's title, and is therefore estopped from denying it. *Adams on Ejectment, p.* 276 (*p.* 313 *to* 315 *and notes*); *Whiteside vs. Jackson*, 1 *Wend.*, 418.

7. The defect of subscribing witnesses, if essential, would be a defence to the foreclosure.

8. The face of the record title shows the deed to be prior to the mortgage, the dates being presumptive of the time of delivery. *McConnell vs. Brown, Litt. Sel. Cases*, 459, *cited in* 2 *U. S. Digest, sec.* 65; *Sweetzer & Lowell*, 33 *Maine*, 446.

9. A purchaser having no notice but the record has a right to rely on it as it appears, and is only bound by the facts shown in the record. *Dana vs. Newhall*, 13 *Mass.*, 498; *Somes vs. Brewer*, 2 *Pick*, 184; *Blight vs. Schenck*, 10 *Burr.*, 295; *Peirce vs. Taylor*, 10 *Shep.*, 246; *Naylor vs. Throckman*, 7 *Leigh*, 48; 1 *Hilliard on Mort., p.* 666; *sec.* 4*a*, &c., *Fridley vs. Hamilton*, 17 *Serg. & R.*, 70.

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10. The question of time being material to the purchaser's title, the Plaintiff and his grantor are estopped from denying that the estate passed at a different time from its date. *Fribbe vs. Oldham*, 5 *J. J. Marsh*, 137; *Bank of Limestone* 1 *J. J. Marsh*, 378; *Milliken vs. Coombs*, 1 *Greenl.*, 343; *Dyer vs. Rich*, 1 *Metcalf*, 150; 2 *Smith's leading cases*, *Am. Ed.*, 567, *and authorities.*

11. There having been a previous contract for the sale on the 6th June, 1856, and the deed being executed on the same day in pursuance thereof, the title vested on that day by relation. *Jackson vs. Bell*, 1 *Johnson's Cases*, 81 *and note.*

12. From the nature of the case the title under the deed vested before the mortgage, the latter being a reconveyance of the prior title, in fact, aswell as according to the intent of the parties. 1 *Hill. on Mort., p.* 666, *sec.* 4*a*; *Naylor vs. Throckmorton*, 7 *Leigh*, 98; *Exparte Stagg*, 1 *N. and M.*, 405; *Lemon vs. Heirs of Jacob Staats*, 1 *Cow.*, 592; *sec* 29 1 *Greenleaf's Ev., p.* 38.

II.—The vendor in this case had no lien or equitable charge on the land outside of the lien created by the mortgage—his vendor's lien having been waived by taking a mortgage on the land. *Selby & Stanley vs. Cooley*, 4 *Minn. R.* 65. Nor had the purchaser any notice of such an equity, if it existed. *Ibid.*

III.—The equities of the purchaser, without notice, preponderate, as the vendor is liable to laches in not reciting in the mortgage his equitable claim for purchase money.

Points and Authorities of Respondent.

I.—In the case of a sale and conveyance of land, and a mortgage taken at the same time, in return, to secure the payment of the purchase money, the mortgage will have preference over a prior docketed judgment against the purchaser and mortgagor. The deed and the mortgage are considered as parts of the same contract, and constituting one act; and justice and policy equally require that no prior judgment against the mortgagor should intervene and attach upon the land, during the transitory seizin, to the prejudice of the mortgage.

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This is the language of Kent, in *4th Kent, p.* 174, and is undisputed law. See also the following authorities, viz.: *Talman vs. Farley*, 1 *Barb. S. C. R.*, 280; *Holbrook vs. Finney*, 4 *Mass.*, 566; *Clark vs. Monroe*, 14 *Mass.*, 351; *Stow vs. Tift*, 15 *John.*, 457; *Jackson vs. Austin*, 15 *John.*, 477; *Haywood vs. Nooney*, 3 *Barb. S. C. R.*, 643; *Kersted vs. Avery*, 4 *Paige*, 9; *Rawson vs. Lampan*, 1 *Selden*, 456.

In such cases the question is when did the deeds take effect, and the estates actually pass? The date of the instruments have nothing to do with the time that the estates pass. The deeds operate when delivered, and the date of the deeds could only be important as raising a presumption of the time when they took effect, when other and better proof is wanting, which presumption yields instantly to the real fact when found, as in the case at bar.

II.—A sale of the land of the debtor under a judgment can only pass such an interest and estate as the judgment debtor then has, or has had at some time during the pendency of the lien of the judgment in the land sold. That interest and estate, and that only, is what the officer making the sale advertises and offers for sale, and the language of every writ, advertisement, certificate and conveyanee, connected with the sheriff's sale, under which the Appellants claim, shows that the interest of Baker and nothing more was the subject of the sheriff's sale and conveyances.

III.—If the Appellants claim any immunities or equities in this case growing out of the plea that they are innocent purchasers for value, we answer them in various ways.

1. The case at bar does not show them to be such.

2. That they are not innocent purchasers for value under the statute known as the recording act; the statute only makes void a prior unrecorded conveyance, as against a subsequent recorded one to a purchaser *bona fide*. *Pub. Stat., p.* 40, *sec.* 24; *Clark vs. Graham*, 6 *Wheaton*, 567; *Stone vs. Ashley et al.*, 13 *N. H.*, 38; *French vs. Freach*, 3 *N. H.*, 234; *Pritchard vs. Brown*, 4 *N. H.*, 397; *N. H. R. S.*, 244; *Carter vs. Champion*, 8 *Conn.*, 549; *White vs. Wheaton*, 8 *Conn.*, 535. These decisions are sustained by *Stevenson vs. Cloud*, 5 *Blackf.*, 91; 2 *Hill.*, 392, 314; no estoppel, see 26 *Conn.*, 195, in library.

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3. The Appellants claim no title in the premises except what comes through this defective deed, and the rule is settled beyond controversy that a purchaser of lands is bound to notice defects of title, and such incumbrances, as appear on the face of any deed, through which he derives title. 6 *Michigan*, 116.

To entitle himself to protection in equity, as an innocent purchaser for value, and thereby defeat prior equities existing at the time of the purchase, the party must show that the purchase he so made in good faith was of the legal estate in the land; for the purchaser of an equitable estate only, of anything less than the full legal estate, takes subject to every outstanding equity. 2 *Eq. Lead. Cases, part* 1, *p.* 63, *et seq.; Boone vs. Chiles*, 10 *Peter*, 177; *Krammer vs. Arthurs*, 7 *Barr.*, 165; *Gallion vs. McCaslin*, 1 *Blackf.*, 91; *Schiras vs. Craig*, 7 *Cranch*, 34, 48; *Vattier vs. Hind*, 7 *Peter*, 271; *Sargent vs. Ingersoll*, 7 *Barr.*, 340; *Parsons vs. July*, 1 *Yerger*, 296.

5. The purchaser at a Sheriff's sale of the legal estate even, is not regarded as a *bona fide* purchaser for value. As to whether he can claim the benefit of the recording acts, so that his deed from the Sheriff, when recorded, shall prevail over a prior unrecorded deed of which he has no notice, the decisions are conflicting. The following authorities and many others hold that he cannot, viz.: *Freeman vs. Hill*, 1 *Dev. & Bat. Eq.*, 389; *Polk vs. Gallont*, 2 *Id.*, 395; *The Bank of South Carolina vs. Campbell*, 2 *Richardson's Eq.*, 179; *Williams vs. Hollinsworth*, 1 *Shobhart*, 102.

Other authorities hold that the recording acts apply to such purchasers, and that they are taken out of the general rule by virtue of the statutes.

6. It cannot be pretended that a purchaser at a Sheriff's sale stands on higher equitable grounds as innocent purchasers, than do innocent purchasers claiming direct from the judgment debtor.

7. But Baker was in possession of the premises, and therefore the character, nature and extent of his title to the same, was always to be ascertained by enquiry on the premises; such possession is constructive notice to the world. In con-

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nection with this fact, the records in the office of Register of Deeds for Ramsey county, showed that the deed to Baker and the mortgage back was one transaction, and fully sufficient to put the subsequent purchaser on enquiry whether the mortgage was not in fact for the purchase money. The rule is that whatever would put an ordinarily prudent man on enquiry, which enquiry would lead to the discovery of a fact, shall be deemed constructive notice of that fact. *Taylor vs. Stibbet*, 2 *Ves. Jr.*, 437; 13 *Ves. Jr.*, 118; 14 *Ves. Jr.*, 426; *Jackson vs. Neely*, 10 *John.*, 374.

The Appellants, then, looking up the title to this land, and finding that Baker gets title from Pairo and then immediately mortgages it back to him, could hardly have concluded otherwise than that the mortgage was for the purchase money. As prudent men, then, seeing a mortgage like this executed back by the vendee to the vendor, they should have asked Baker, who was on the premises, if the mortgage was not for the purchase money, or they could have sought this information from Pairo, whose residence was named both in the deed and mortgage.

Horn & Galusha, Counsel for Appellants.

Geo L. & E. A. Otis, Counsel for Respondent.

By the Court—Atwater, J.—The deed from Pairo to Baker of the premises in dispute, had no witnesses, and the objection has been raised upon the argument that nothing passed by that instrument, and that the title still remains in Pairo. In the view taken by the Court of this case, it seems unnecessary to examine this objection. Both parties claim title through Pairo, and under Baker. The pleadings of both parties recognize the legal title in Baker, nor does there seem to have been any question raised in the Court below as to his title. The contest between the parties is for Baker's title or interest whatever the same may be; the respective right of the parties thereto has been the question acted upon by the Judge before whom the cause was tried, and is the only one in fact upon which the decision of this Court seems desirable or important.

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The deed and mortgage bear different dates, but the finding of the Court shows that they were delivered at the same time, and that the deed was recorded fifteen minutes previous to the record of the mortgage. The instruments take effect from the time of delivery, and the question is, where a deed is executed for land, and a mortgage at the same time taken back by the grantor, to secure the purchase money, will a prior judgment against the mortgagor take precedence of the mortgage as a lien upon the premises? The Court below held, we think correctly, that the mortgage lien was prior to that of the judgment.

Such we understand to be the rule as settled in England, and in several of the States at least of this country. It is based upon the ground that the deed and mortgage are considered as parts of the same contract, and constituting one act, and in the eye of the law there is no moment of time in the transfer when the lien of the judgment could gain preference of the mortgage. Whether or not this reasoning be strictly and logically correct, it is obvious, as remarked by Justice Kent, that "justice and policy equally require that no prior judgment against the mortgagor should intervene, and attach upon the land during the transitory seizin, to the prejudice of the mortgagee." 4 *Kent's Com.*, 174. This principle has been recognized in numerous cases, among which may be cited, *Holbrook vs. Finney*, 4 *Mass.*, 566; *Clark vs. Munroe*, 14 *Mass.*, 351; *Stowe vs. Tifft*, 15 *John.*, 457; *id.*, 477; *Talman vs. Farley*, 1 *Barb. S. C. R.*, 280; *Haywood vs. Nooney*, 3 *Barb.*, 643; *Kiertsted vs. Avery*, 4 *Paige*, 9; *Ransom vs. Lampan*, 1 *Selden*, 456; *Kittle vs. Van Dyck*, 1 *Sand. Ch. R.*, 76, *The Farmers' Loan and Trust Co. vs. The People*, 1 *Sand.*, 139; 2 *Gill. & Johns.*, 318; 4 *Leigh.*, 30; 1 *McCord's Ch. R.*, 270.

It is claimed by Appellants that the decisions in the New York Courts are not here authority, for the reason that in cases like the present, the statutes of that State expressly make the mortgage lien prior to that of the judgment. It is true such a statute exists in that state, but that the law was comparatively well settled previous to the enactment of the statute, appears manifest from an examination of the authorities; and

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in Kent, (above cited,) it is said that "this sound doctrine is, for greater certainty, made a Statute provision in New York." The act was manifestly declaratory of the rule at common law, though some doubts had been raised concerning it, which it was the object of the statute to remove. The case of *Holbrook vs. Finney*, above cited, was not decided upon any statute, but upon principles settled by the English authorities, and although that was a case involving the right of dower, it is entirely analagous to the case at bar, and was decided upon the ground that the husband had only an instantaneous seizin, upon which the right of dower could not attach. And Spencer, Justice, in *Stow vs. Tifft*, 15 *John.*, says, "I entirely agree in the opinion expressed by Ch. J. Parsons in the case of *Holbrook vs. Finney*, that where a deed is given by the vendor of an estate, who takes back a mortgage to secure the purchase money at the same time that he executes the deed, that there the deed and the mortgage are to be considered as parts of the same contract, as taking effect at the same instant, and as constituting but one act; in the same manner as a deed of defeasance forms, with the principal deed, to which it refers, but one contract, although it be by a distinct and separate instrument."

The deed and mortgage then, are to be considered as a single indivisible bargain or contract of sale, and as if they were written in one instrument, and executed at the same instant by both parties. By the mortgage a condition was annexed to the grant, and whatever passed by the grant passed subject to the condition. There was no moment of time when Baker owned or held the premises free from the condition, nor when he could voluntarily have conveyed them, except subject to the mortgage. Can a judgment creditor then, by virtue of his judgment, obtain a greater interest in the premises than the debtor himself had? I think it is well settled, that the lien of the judgment will in all cases be limited to the actual interest which the judgment debtor has in the estate. 1 *Atk. on Conv.*, 512; 1 *Paige*, 128; 4 *Paige*, 9. The rule is based on principles of justice and public policy, as well as common sense, and can work no hardship to the judgment creditor. So far as the contract between Pairo and

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Baker is concerned, there can be no question but that it was the intent to give Pairo the first lien on the premises; nor can it be claimed that he would have parted with the premises on any other condition. The judgment creditor having parted with nothing on the strength of this conveyance to Baker, it would be highly inequitable to permit the judgment to be satisfied out of what, in fact, was Pairo's property.

The deed from Pairo to Baker was dated some ten days previous to the mortgage from Baker to Pairo, and the Appellants claim that they are *bona fide* purchasers for a valuable consideration, and that they were justified in regarding the dates of the instruments, as the times of their delivery, respectively. The date of a deed or mortgage, is at most, only presumptive evidence of the time of delivery, and this presumption may always be rebutted by proof, as in the case at bar. Nor do the claimants under the judgment stand in as favorable position even, as would a party actually advancing money to Baker, on a purchase of the premises at private sale. "Judgment creditors are not in equity regarded as *bona fide* purchasers, and entitled to the consideration which equity gives them, when they become such without notice, for a valuable consideration actually paid; but they are looked upon simply as proceeding *in invitum*, to enforce their legal demands, and are not entitled to the same favor as a purchaser, whose right may be enforced through the conscience of the other party." 3 *Barb.*, 285. Such was the law in this state at the time of the sale under the judgment. *Greenleaf vs. Edes*, 2 *Min.*, 264. But as there never was a time when Baker could have made a voluntary conveyance of the premises free from the mortgage lien, it is impossible that any person by such means could claim to be a *bona fide* purchaser, so as to defeat the mortgage. A judgment creditor therefore, if the position of the Appellants be tenable, would occcupy a better status, than a purchaser of the premises under Baker, for a valuable consideration. And he would be permitted to acquire a larger interest in the premises than his debtor ever had, to the great injury of the equitable and real owners of the estate. The owners of the judgment, and the mortgage, were both creditors of Baker, but the judg-

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ment being a general lien must yield to the specific lien of the mortgage. This would be so, had both liens attached at the same instant, but in accordance with the views above expressed, we hold the lien of the mortgage first attached, and should first be satisfied out of the premises.

The judgment below is affirmed.

JOHN CLARK, Plaintiff in Error, *vs.* RANSOM NORTON and PHLEMING D. JOHNSON, Defendants in Error.

ERROR TO THE DISTRICT COURT OF SCOTT COUNTY.

Where an officer is sued in trespass for taking property under process, the process alone, if regular and valid on its face, is sufficient to protect him, even if the officer who issued it had not jurisdiction. But the rule is different when the officer himself, or a party claiming under him, brings suit to recover the property, or its value, against a stranger intermeddling with the property. In such case he must show not only process regular upon its face, but that the Court or officer had jurisdiction to issue the same.

The right of an officer to bring an action for goods levied upon by him, depends upon his special property, and liability over; if the process be void, he acquires no title, and cannot be liable over to the Plaintiff at whose suit the process issued, and consequently cannot and ought not to be permitted to maintain an action for the recovery of the property, or its value.

In pleading the process of a Court of inferior and limited jurisdiction, it is necessary to allege every fact requisite to show that such Court had acquired jurisdiction of the subject matter, the parties and the process, and nothing is presumed in their favor so far as it respects jurisdiction; and the party seeking to avail himself of their process, must show that they had jurisdiction affirmatively.

Certain goods were attached by a constable, in an action in favor of *Kercher vs. Knickern*, for $30.82 and costs. The property was replevied by one Norton, and the replevin bond was conditioned that Norton should appear on the return day, and prosecute his suit to judgment, and return the property if a return thereof be adjudged by the Court, and pay all costs and damages that might be adjudged against him. In a suit upon the bond, the Plaintiff assigns as a breach, that the said Norton did not prosecute his suit, &c., but that the same was dismissed, and judgment rendered against him for the costs of the action. Upon these facts the Plaintiff avers that anaction hath accrued to him to recover the amount of the judgment in the action in which the attachment issued, and damages. *Held*, that in the replevin suit, the Defendants should have asked for a judgment *de retorno*, and have had their damages assessed; and a judgment for the return and damages would have fixed the liability of the sureties on the bond. As it was there was no breach of the bond, to warrant the judgment demanded.

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Points and Authorities of Plaintiff in Error.

I.—The complaint alleges that the Plaintiff, on a day certain, had possession of the property in question. This allegation is sufficient to show the fact of his possession, and nothing more than possession is necessary to entitle him to sue a stranger for divesting him of his possession. But in this case it is not stated as one of the facts necessary to constitute a cause of action: it is simply matter of inducement.

The defendants admit his possession by bringing an action of replevin for the purpose of divesting his possession. It was not therefore necessary for the Plaintiff to show his official character, or that he held the property by virtue of legal process. He might have stated that he was a thief and had stolen the property, and that he had possession of the property by virtue of his title as such thief, and he could then have maintained an action to recover the possession of the property against any one who could show no better title.

II.—The action is brought upon a replevin bond for a violation of one of its conditions, to wit: that Defendant Norton did not prosecute his action to a judgment, but that instead thereof, he suffered himself to be non-suited on the return day of the writ.

The bond is not void for its uncertainty, for the reasons,

1. That the subject matter of property referred to in the bond can be identified by parol evidence, and can be and is supplied by averment, even under the strictest rules laid down by Lord Bacon, and other English Judges, relative to ambiguous instruments. 2 *Phillips on Evidence*, 293-2; *vol.* 4, *part* 2, *Cow. & Hill's Notes, pp.* 496-7-8; *Case agt Young et al.*, 3 *Minn. Rep.* 209; *Baldwin agt. Winslow*, 2 *Minn. Rep.* 213.

2. Because a party and his sureties are always precluded from gainsaying the jurisdiction of the Court, or the validity of any instrument, or legality of any proceedings, through or by the aid of which they have been enabled to obtain the possession of valuable property or rights of any kind. *See* 16, *H. P. R.* 124, *and cases there cited.*

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Points and Authorities of Defendants in Error.

I.—The Plaintiff himself characterizes the possession and defines the title under which he claims a right to recover.

By that he is bound and cannot be permitted to stand on a naked possession. He asserts his special title as a constable as the foundation of his claim, and supports it by possession "as such constable." 16 *Wend. R.* 562; 12 *do. do.*, 74. He is therefore bound to allege, as well as prove, all the facts necessary to establish such special title, for his right to recover depends upon his liability over, and unless the process under which he acted is valid in law, he is not liable over at all. The action is not against a party, but strangers to the process, which he is using as a sword and not as a shield.

The counsel for the Plaintiff is manifestly in error in saying that the Plaintiff might have recovered the property against a stranger upon an alleged possession as a thief. Such an allegation would thoroughly vitiate his claim to a recovery, and courts do not aid criminals in that way.

II.—The Plaintiff fails to show by his complaint that the Justice of the Peace who issued the warrant of attachment under which he claims, had jurisdiction of the subject matter, the parties or the process, in the case in which the attachment was issued, nor does he show that the attachment was good on its face. 2 *Denio R.*. 648; 1 *Hill R.*, 118; 16 *Wend. R.*, 562; 3 *Cow. R.*, 206; 1 *Cow. Tr.*, 398 *to* 405, 2*d ed.*; 2 *Greenlf. Ev.* § 629; 6 *Hill R.* 311; 5 *Hill R.* 194.

In pleading the process of a court of inferior and limited jurisdiction, it is necessary to allege every fact requisite to show that such court had acquired jurisdiction of the subject matter, the parties and the process; and this rule applies to the officer serving the process when he seeks to use it to build up a title against a stranger.

In this case he has stated the names of the parties to the process of attachment, and the amount, and that is all. He does not show the cause of action, or that any affidavit was made and filed, or that any security was given.

III.—It does not appear by the Plaintiff's complaint that

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the Justice of the Peace who issued the writ of replevin had jurisdiction of the subject matter, parties or process in that action, and the remarks heretofore made relative to the warrant of attachment apply. 18 *Wend. R.*, 521; 19 *Wend. R.*, 283-531.

IV.—Though the bond should be adjudged valid, no sufficient breach of its condition is alleged to entitle the Plaintiff to recover. The first breach alleged is, upon the face of the complaint, untrue. The action did proceed to judgment. Judgment of dismissal or non-suit and for costs, was rendered.

The Defendant in that suit (the Plaintiff in this) should then have taken his judgment *retorno*, and for his damages for the detention of any. That, he omitted to do, and it is a failure of his own. By the terms of the bond the Defendants are not liable to return the property, unless return thereof be adjudged, nor are they liable for damages, except they "be adjudged against him by the Court" in that case. No such judgment for a return of the property, or its value, or for damages, was rendered in that action.

There is not anything in the condition of the bond to make the Defendants liable for the amount of any claim in suit or judgment before Huyderstaedt, J, or for any sum that Kniskern might owe Kercher. If the Plaintiff was liable over for that debt, by reason of his service of the attachment, his remedy was clearly to take his judgment *retorno* in the replevin suit, assessing the value of his special title as the alternative recovery, in case the property should not be returned. Failing to do that, he failed to fix any liability on the bond, even for the costs.

But the Plaintiff does not claim to recover in this action the amount of the judgment for $1.55 costs rendered by Varner, in the replevin suit. He does not allege the non-payment of that judgment, or a breach of the condition of the bond. He does not allege its non-payment at all. He only claims to recover the amount of the damages and costs in the judgment rendered by Huyderstaedt against Kniskern in favor of Kercher.

The consequential damages cannot be allowed. None are allowable in such cases, but if they were, the statement of the

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claim is so vague, indefinite and uncertain as to be wholly void. It does not contain any notice to the Defendants of the manner how, or the facts on which they accrued. It does not state any fact constituting a cause of action, in plain language, so that the Defendants may know what is intended by the Plaintiff.

V.—The judgment of the District Court is manifestly right and ought to be affirmed.

L. M. Brown, Counsel for Plaintiff in Error.

A. G. Chatfield, Counsel for Defendants in Error.

By the Court—Atwater, J.—This was an action commenced in a Justice's Court, of Scott County, by Clark, the Plaintiff in Error, upon a replevin bond, executed by Norton and Johnson. The cause was taken by appeal to the District Court of that county, and upon motion of Defendants' attorney, judgment was rendered for Defendants, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The Plaintiff removes the cause to this Court by writ of error.

The grounds of error urged below in the motion for judgment, or rather the defects in the complaint, will be better understood by presenting those portions of the pleading, which embrace the material facts, which are as follows:

The complaint shows to the Court, that on the 4th day of October, 1860, the Plaintiff was constable of the town of Sand Creek, in Scott County, and as such constable had possession of a quantity of grain in the stack, viz.: the undivided half of one stack of wheat, &c., of the value of fifty dollars; which property the Plaintiff then held under and by virtue of an attachment to said Plaintiff as such constable, delivered and issued by F. A. Hyderstoedt, Esq., Justice of the Peace of said county of Scott, in favor of Kasmier Kercher, Plaintiff, against Martin Kniskern, Defendant, for the sum of $30.82, besides costs. That on the said 4th day of October, 1860, a replevin suit was commenced before William Varner, Esq., a Justice of the Peace of said County, by said

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Norton against said Plaintiff, for said grain so held by the said Plaintiff under the said attachment, and the said undivided half, &c., was then and there taken and replevied out of the possession of the Plaintiff; that previous to the issuing of the said writ of replevin, and on the said 4th day of October, 1860, the said Norton, as principal, and the said Johnson, as surety, made, executed and delivered to said William Varner a bond or obligation in writing under their respective hands and seals, and duly approved of in writing by said Varner, which said bond is substantially in words and figures following, viz.:

"Know all men by these presents, that we, Ransom Norton and P. D. Johnson, as surety, are held, &c., unto John Clark in the sum of eighty dollars, for the payment of which we bind ourselves, &c."

The condition of the above obligation is such, whereas the above bounden Ransom Norton has this day commenced a replevin suit against John Clark, now if the said Norton shall appear on the 24th day of October, 1860, the return day of the writ, and prosecute his suit to judgment, and shall return the property if a return thereof be adjudged by the Court, and shall pay all costs and damages that may be adjudged against him by the Court, this obligation to be void, otherwise of force and effect.

And the Plaintiff further says and assigns as a breach of the said bond, that the said Ransom Norton did not prosecute his said action to judgment, but on the contrary thereof, the said suit was on the said 24th day of October, 1860, dismissed, and a nonsuit ordered, and a judgment rendered by said Varner, Justice as aforesaid, against said Norton in favor of the Plaintiff (the Defendant in that suit,) for one dollar and fifty-five cents costs of suit, whereby an action hath accrued to said Plaintiff, to demand and have of and from the said Defendants the amount of the said demand specified in said attachment, besides costs, which said demand is now in judgment before said Hyderstaedt in said suit in favor of said Kircher against said Kniskern for the sum of $30.82 debt, and $6.35 costs of suit, &c.

The Plaintiff does not claim to be the owner of the prop-

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erty taken by the Defendants in the replevin suit, but asserts a special title to it by virtue of his office as constable. To maintain the action, it might perhaps have been sufficient to have alleged simply that he was in possession. But he has gone further than this, and stated how he came in possession, and avers that he held the property "by virtue of an attachment to said Plaintiff as such constable." The process alone, if regular and valid on its face, would be sufficient to protect the officer, when sued in trespass for taking property under it, even if the justice had not jurisdiction to issue it. But the rule is different when the officer himself, or a party claiming under him, brings suit, to recover the property, or the value, against a stranger intermeddling with the property. In such case he must show not only process regular upon its face, but that the Court or officer had jurisdiction to issue the same. *Yates vs. St. John*, 12 *Wend.*, 74; *Earl vs. Camp*, 16 *Wend.*, 562; *Dunlap vs. Hunting*, 2 *Denio*, 643. The right of an officer to bring an action for goods levied upon by him, depends upon his special property, and liability over; if the process be void, he acquires no title, and cannot be liable over to the Plaintiff at whose suit the process issued, and consequently cannot and ought not to be permitted to maintain an action for the recovery of the property, or its value.

The Plaintiff entirely fails to show that the Justice who issued the writ of attachment under which he claims, had jurisdiction either of the subject matter, or of the parties to the suit. In pleading the process of a Court of inferior and limited jurisdiction, it is necessary to allege every fact requisite to show that such Court had acquired jurisdiction of the subject matter, the parties, and the process, and nothing is presumed in their favor so far as it respects jurisdiction; and the party seeking to avail himself of their process must show that they had jurisdiction affirmatively. *Cow. & Hill's Notes to Phil. on Ev., vol.* 4, *part* 2, 110, *and cases cited;* 1 *Denio*, 158; 3 *Cow.*, 206. It does not appear that any affidavit was filed with the Justice before issuing the writ of attachment, nor that the case was one of those specified in the statute authorizing writs of attachment. The same objections also to a certain extent, apply to the writ of replevin, as if that was

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unauthorized and void, the surety could not, we think, be held on the bond. And see further, as to what must be alleged by Plaintiff in this case, 1 *Hill*, 118; 1 *Cow. Tr.* 398, *et seq.*; 2 *Greenleaf's Ev.*, *sec.* 629; 6 *Hill*, 311; 5 *Hill*, 194; 3 *Coms.*, 193.

But there is still another objection in the way of the Plaintiff on this complaint. The condition of the bond is that "if the said Norton shall appear on the 24th day of October, 1860, the return day of the writ, and prosecute his suit to judgment, and shall return the property, if a return thereof be adjudged by the Court, and shall pay all costs and damages that may be adjudged," &c. Breach, that he did not appear and prosecute. Whereupon, the Plaintiff avers, that an action hath accrued to him to recover the amount of the judgment recovered by Kercher against Kniskern. But the obligation was not to pay this judgment, nor is there anything in the bond itself, or in the pleadings, from which it can even be inferred, that such was the intent of the obligation. There is no ambiguity in the instrument, as to the conditions on which the obligors were to become liable. By the terms of the instrument, in no contingency were they to become liable for the payment of the judgment above named. If the Plaintiff failed to appear and prosecute his action to judgment, then, they were liable for a return of the property if a return thereof should be adjudged by the Court, and also to pay all costs and damages that might be adjudged against the Plaintiff by the Court. But it does not appear that any return of the property was adjudged by the Court, and consequently there has been no breach of the obligation on that head. Nor does it appear that any damages were adjudged. The Defendants should have asked for a judgment *de retorno*, and have had their damages assessed, and a judgment for a return and damages might have fixed the liability of the Defendants upon the instrument. As the Plaintiff has had no return of the property adjudged, the presumption is that he was not entitled to it, and consequently is not liable over to the Plaintiff in the attachment suit. At all events, the only statement tending to show a liability on the part of the obligors, is that judgment was rendered against them for $1.55 costs, in the

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replevin suit. Whether the Plaintiff would be entitled to recover for this item without alleging that the costs are unpaid, may be questionable, but I deem it unnecessary to decide the point, as the action is not for the recovery of these costs. The complaint in its demand for judgment is silent as to these, unless indeed they be included in the general allegation of damages,—an allegation, too general, indefinite, and uncertain, to permit the introduction of proof of specific damage. The prayer of the complaint is to recover the amount of the judgment rendered by Hyderstoedt, and damages, and it is to this claim the Defendants are required to answer. The complaint does not state facts entitling the Plaintiff to recover that judgment, and the judgment of the District Court is affirmed.

WILLIAM H. C. FOLSOM, Appellant, *vs.* CHRISTOPHER CARLI, Respondent.

APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY.

Assumpsit for use and occupation cannot be supported, where the possession is adverse, and the relation of landlord and tenant has never subsisted between the parties; but the Plaintiff must declare in ejectment or trespass. Such a demand could not have been the subject of a set-off to an action upon a note prior to the adoption of the Code in 1851.

The word "obligation," in subdivision two, of section seventy-one, page 541, of *Stat. of Miss.* was intended to apply to all matters arising *ex contractu*; but any claim that would not have been the proper subject of set-off before the adoption of the Code, does not fall within the provisions of said subdivision two.

When the basis of the transaction between the parties is a contract, and the breach of the contract amounts to a trespass, or entitles the injured party to an action for negligence, or fraud, or otherwise, in the nature of an action *ex delicto*, he is not deprived of his right to set off such a claim, or a claim arising on contract may be set off against such a cause of action. In all such cases there is a contract between the parties, in fact, and the wrong-doer is not allowed to deprive the injured party of the advantage of it, by having tortiously violated it.

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Points and Authorities of Appellant.

I.—It appears from the pleadings and the evidence that the premises described in the answer were sold to the Defendant at Sheriff's sale, under execution, on the 18th day of May, 1859, and that from and after the said 18th day of May, 1859, the defendant was entitled to the possession of said premises, and was entitled to the use, rents, issues and profits thereof; and it also appears that from and after the said 18th day of May, 1859, the Plaintiff held the possession of said premises, and had the use and received the rents and profits thereof, and that the Defendant suffered and permitted the Plaintiff so to do.

II.—The Plaintiff having held possession of the premises from the date of the sale, and had the use and rents thereof which belonged to the Defendant, there was a legal obligation resting upon the Plaintiff to pay the defendant the value thereof, and the fact that the Plaintiff had a deed from the judgment debtor, and went into possession under that deed and occupied the premises, claiming under that deed as owner, does not excuse the Plaintiff from that legal liability.

III.—The distinction between the forms of action are abolished in this State; parties are to state the facts constituting the cause of action, and if upon these facts the Defendant was entitled to recover his counter-claim, the Plaintiff cannot defeat the Defendant's right, simply by making an adverse claim to the premises. *Minn. Stat.* 532, *see.* 1.

IV.—When the grantor remains in possession of granted premises, or when the judgment debtor remains in possession of premises after sale thereof under execution (under the statute of July 29th, 1858), the grantee may elect to treat him as a tenant, or as a trespasser or disseisor; the purchaser may waive the tort where the grantor or judgment-debtor hold over against the will of the purchaser. *Curtis vs. Treat*, 8 *Shep.* 525; *Larrabee vs. Lambert*, 34 *Maine* 79; *Clough vs. Hosford*, 6 *N. H.*, 231. Neither an express permission, or a demise, or an actual tenancy, were necessary to the maintenance of the technical action of assumpsit for use and occupa-

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tion under the former practice. 2 *Sel. Nisi Prius*, 1424; *Cummings vs. Noyes*, 10 *Mass.* 433; *Chitty on Con.* 332; 1 *Dutch.* 293; *Pierce vs. Pierce*, 25 *Barb.* 243.

V.—It is not alleged, nor was it shown upon the trial, that the Plaintiff occupied the premises against the Defendant's will, nor either that the Defendant had notice or knew that the Plaintiff claimed to own the premises, or hold them adversely to the Defendant; and the Plaintiff cannot defeat the Defendant's counter-claim by first making known such claim in his reply, or upon the trial. *Oakes vs. Oakes*, 16 *Ill.* 106.

VI.—The Court below erred in overruling the Defendant's objection to the introduction of the deed from Noah McKusick and wife to the Plaintiff.

VII.—The Court below erred in overruling the Defendant's objection to the offer of the Plaintiff to show that the Plaintiff went into possession of the premises under the deed from McKusick and wife.

VIII.—The Court below erred in overruling the Defendant's objection to the proposal of the Plaintiff to show that the Plaintiff had remained in possession of the premises under and by virtue of that deed.

IX.—The Court below erred in charging the Jury as follows, to wit:

"If you find that Noah McKusick, being the owner of the premises, with his wife, subsequent to the judgment, but before the sale to the Defendant, sold and conveyed the premises to the Plaintiff, and that the Plaintiff entered into possession, and has since retained the possession, claiming under that title, then the Defendant cannot recover under his counter-claim; and the Plaintiff would be entitled to recover the amount of his claim without set-off."

Points and Authorities of Respondent.

I.—The Plaintiff holding adversely to the Defendant the premises for the use and occupation of which the Defendant claims the right to recover, and the relation of landlord and tenant having never existed, the Defendant cannot offset or recover his counterclaim. See 1 *Chitty's Pleadings*, 107; 6th

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N. H., 298; 1 *Wend.*, 134; 6 *John.*, 46; 11 *Vt.*, 190; 13 *John.*, 489; 11 *Pickering*, 1; 12 *Mass.*, 43; 17 *ib.*, 299; *Taylor's Landlord and Tenant, sec.* 636, *and cases cited; Comp. Stats. of Minn.*, 541; 3 *Cow.*, 286.

II.—The Court below properly received in evidence the deed from Noah McKusick and wife to the Plaintiff for the purpose for which it was offered.

It was competent for the Plaintiff to show an adverse title, and connect himself with it, existing prior to Defendant's pretended claim.

III.—The Court below committed no error in permitting the Plaintiff to show under what title he went into the possession and held said premises.

IV.—The charge of the Court was a proper exposition of the law as applied to the facts of this case. See authorities above cited.

W. H. Burt, Counsel for Appellant.

L. E. Thompson, Counsel for Respondent.

By the Court—Flandrau, J.—Carli brings suit against Folsom on a promissory note for $129.52, dated January 22, 1859, payable in seven months after date with interest at one per cent. per month. The answer of Folsom sets forth that on the 30th day of November, 1857, one Lee recovered a judgment against two McKusicks and the Defendant Folsom, for $445.35. That prior to the recovery of the judgment, at the time thereof, and up to the 25th day of August, 1858, Noah McKusick, one of the Defendants in the judgment, owned a certain piece of land in fee. That execution was issued on the judgment February 12, 1859, and the land of Noah McKusick sold thereon on the 18th day of May, 1859. That the Defendant purchased the land at the sale for $338.81. That no redemption has been made, and no interest paid, and that the Plaintiff has been in the occupation of the premises since the sale by the permission and sufferance of the Defendant, and the Defendant claims the value of the use of the premises as a counter claim to the note.

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The reply alleges that the Plaintiff on the 28th day of August, 1858, purchased the premises from Noah McKusick and wife in fee, and that he has been in the occupation of them ever since by virtue of his ownership and not otherwise.

Upon this state of facts the Plaintiff had a verdict, the Court holding, and directing the jury that the Defendant could not recover his counter claim for use and occupation if the Plaintiff had been in possession under his purchase from Noah McKusick.

The question here is not whether the claim is recoverable at all, but whether it can be put in as a counter claim. The Plaintiff held and enjoyed the premises under a title from the real owner free from any connection with the Defendant or the judgment under which he purchased. His possession was adverse to the Defendant, and there was no privity or contract between them upon which the relation of landlord and tenant could arise; therefore any claim that the Defendant has against the Plaintiff for the use and occupation, or more properly speaking, for the value of the possession of the land after he became entitled to it, does not arise out of any contract between them, either express or implied, but upon his wrongful and tortious holding. It is quite clear that the Defendant could not have maintained an action of assumpsit for such use and occupation, before the forms of actions were abolished, as that action could only be maintained as its name imported, upon a contract or undertaking, express or implied. His remedy would have been ejectment or trespass. 1 *Chitty's Pleadings*, 107; *Smith vs. Stewart*, 6 *John.*, 46; *Bancroft vs. Wardwell*, 13 *John.*, 489; *Featherstonhaugh vs. Bradshaw*, 1 *Wend.*, 134; *Vanderheavel vs. Storrs*, 3 *Conn.*, 203; *Little vs. Pearson*, 3 *Pick.*, 301; *Jones vs. Tifton*, 2 *Dana*, 295.

Let us now see whether the claim of the Defendant would have been the subject of a set-off, before the forms of action were abolished. At common law, independently of statutes, a set-off of cross demands, unconnected with each other, was not allowed. A defendant could claim, by way of deduction, all just allowances or demands accruing to him, or payments made by him in respect of the same transaction or account which formed the ground of the action, but could go no far-

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ther. This was remedied by the 2 *Geo.* 2, *ch.* 22, *sec.* 13, where mutual debts were allowed to be set-off against each other. 1 *Chitty's Pleadings*, 569-70-71. The demand must have been in the nature of a debt, and a set-off was excluded in all actions arising *ex delicto*, *Id.* 571-2. The general features of the English statutes of set-off are embodied in our own. *Comp. Stats.* 503, *sec.* 44. This demand could not have been the subject of a set-off against the Plaintiff's claim prior to 1851, the date of the abolition of the forms of actions. It must not be overlooked, that although actions formerly had different names and forms, yet these names and forms were not mere empty words, but arose out of the nature of the subject matter of the action, and entailed upon it substantial privileges and disabilities, materially affecting the rights of parties.

Now what is the effect of our statute upon the subject matter of actions, by providing that "The distinction between the forms of actions at law, heretofore existing, are abolished; and there shall be in this Territory hereafter but one form of action at law, to be called a civil action," &c.? *Comp. Stats.* 532, *sec.* 1. It is fully explained by subsequent portions of the same act, which point out what shall be stated in the complaint, answer and reply, which are the only pleadings now allowed to make up the issues; and it is quite evident, from the chapter on answers, that no change whatever was designed to be made concerning the nature of the demand that might be pleaded to bar, or reduce a recovery by the Plaintiff from the law, as it existed before the passage of the act. The familiar terms of recoupment and set-off are discarded in the new law, and the word counter-claim substituted; but what that counter-claim comprehends is explained. *Section* 71, *p.* 541, provides that "The counter-claim mentioned in the last section must be an existing one in favor of the Defendant and against the Plaintiff, between whom a separate judgment might be had in the action, and arising out of the following causes of action:

1. "A cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the Plaintiff's claim, or connected with the subject of the action."

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Now this is what would have been previously allowed by way of recoupment, and it neither enlarges nor limits that doctrine, but simply declares it as it previously existed.

2. "In an action arising on obligation, any other cause of action arising also on obligation, and existing at the commencement of the suit." This is merely an enunciation of the law of set-off, and does not enlarge it in any respect. If the word that is employed by the statute, "obligation," should be confined within its strict technical sense, it would greatly limit the law of set-off, as it more properly means a "bond." *Co. Lit.* 172 *a;* 2 *Black. Com.* 340. But we think the legislature intended it to receive a more liberal construction, and to apply to all matters arising *ex contractu.*

It is our opinion that any claim that would not have been the proper subject of set-off before the adoption of the code, does not fall within the provisions of *subdivision* 2 *of section* 71, *page* 541 *of the Compiled Statutes*, above quoted.

While the form of actions were in existence, a party had what was called the right of election of actions. This right in the hands of a skilful pleader could be used to great advantage. There were many cases in which a Plaintiff could declare in trespass, trover, or case according to the facts, or he might elect to waive the tort and declare in assumpsit. So in general a Plaintiff could elect to declare either in assumpsit or debt. One of the most usual reasons in practice for adopting a form of action *ex delicto*, instead of declaring in assumpsit, was to cut out an apprehended off-set, which could be interposed to the latter, but not to the former. Many other advantages could be gained by this right of election, which it is unnecessary to enumerate here. The subject is fully treated in 1 *Chitty's Pleadings*, 207-212. *Title* "*Of election of actions.*" But it is believed that with the abolition of the forms of action, and the substitute adopted by our statute, together with the new system of pleading, many, if not all these advantages are necessarily lost to the pleader. He must now state his facts; he must state them truly; and he must prove them as alleged, to succeed. The Defendant in his answer here, attempted to state his claim for the use and occupation of the premises, in the manner he would have done had he

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been framing a declaration therefor in assumpsit. He alleges that the occupation of the Plaintiff was by his "sufferance and permission," thereby establishing the relation of landlord and tenant between them, upon the truth of which alone could the claim be set off. This is put in issue by the reply, and the real facts are therein alleged, the jury finding the reply to be true.

There are many cases where the basis of the transaction between parties is a contract, and the breach of the contract may amount to a trespass, or entitle the injured party to an action for negligence, or fraud, or otherwise, in the nature of an action *ex delicto*. We do not mean to hold that in such cases the party is necessarily deprived of his right to set off such a claim, or that a claim arising on contract may not be off set against such a cause of action. No such result follows from our view of the code. In all such cases there is a contract between the parties in fact, and the wrong-doer is not allowed to deprive the injured party of the advantage of it by having tortiously violated it.

In the case at bar there never was any contract between the parties in fact, or by implication of law. They were total strangers to each other, claiming title to the land from different and adverse sources. In relation to such cases, Mr. Chitty says, "Assumpsit for use and occupation cannot be supported where the possession is adverse, and the relation of landlord and tenant has never subsisted between the parties, but the Plaintiff must declare in ejectment or trespass." 1 *Chitty's Pleadings* 107, *and cases cited.*

We think the Judge was correct in his rulings, and the judgment should be affirmed.

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OSCAR ROOS, Register of Deeds of Chisago County, Appellant, *vs.* THE STATE OF MINNESOTA, *ex rel.* ANDREW SWENSON, Respondent.

APPEAL FROM THE DISTRICT COURT OF CHISAGO COUNTY.

The Act of March 18, 1858, *Stat. of Minn. p.* 111-12, providing the manner in which the county seat of a county may be changed, is unconstitutional, and in conflict with *Art.* 11, *Sec.* 1, *of the State Constitution.* The Legislature must in every case of a change of county lines in counties already organized, or for removing a county seat, pass a special act to take effect upon its adoption by the electors of the county, &c., at the next general election after its passage.

Atwater, J., dissents.

The following is the writ of mandamus issued in this cause: The State of Minnesota:

To Oscar Roos, Register of Deeds of said County of Chisago, greeting: The Plaintiff in this proceeding, Andrew Swenson, citizen, resident, householder, and legal voter of said county of Chisago, has filed with us his certain affidavit in this behalf made, and our said District Court has been pleased thereupon to grant this our high prerogative writ of mandamus. And true it is,—

That the said Andrew Swenson is, and for a long time has been, a citizen, resident, householder and legal voter of said county of Chisago and State of Minnesota.

That on or about the 5th day of September, 1860, at said county of Chisago, and more than thirty days previous to the next ensuing election to be held in the said county of Chisago, a petition in writing duly addressed to the Board of County Commissioners of Chisago county, Minnesota, was then and there presented and delivered to said commissioners; said petition being duly signed and subscribed by a number of the citizens and legal voters of said county, equal in number to one-half of the highest number of votes cast at the general election held in said county next preceding said 5th day of September, 1860. The prayer in said petition contained was

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in substance as follows, to wit: That the citizens and legal voters of said county of Chisago at the next ensuing general election to be held in said county on the 6th day of November, 1860, might be allowed to vote on the removal of the county seat of said county of Chisago from Taylor's Falls to Center City, in said county of Chisago.

That the number of said citizens and legal voters whose names were subscribed to said petition, and who signed the same, was 235, and that the whole number of votes cast in said county of Chisago at the general election held therein on the 11th day of August, 1859, was 432.

That the said petition was signed by a larger number of petitioners than any other petition presented to said commissioners asking to be allowed to vote on the removal of the said county seat at said election.

That no vote was taken at the said general election to remove said county seat to any other point.

That no vote was taken at the last preceding election held in said county before that time to remove the said county seat to said Center City.

That no vote had been taken at any election held in said county within three years next preceding the said election held on the 6th day of November, 1860, to remove said county seat.

That said county seat had been located at Taylor's Falls more than three years next preceding the said election held on the said 6th day of November, 1860.

That no vote for relocating or removing the said county seat had been taken for more than three years next preceding said 6th day of November, 1860.

That afterward, and in compliance with the said prayer of said petitioners in said petition contained, the said commissioners duly caused to be inserted in the notices of the said general election to be held on the 6th day of November, in said county, an article requiring the voters of said county to vote on the removal of the said county seat from Taylor's Falls to the said Center City.

That on the said 6th day of November, 1860, at the several polls and places of voting in said county, the citizens and

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legal voters thereof did then and there, in due form of law and in pursuance of the notices aforesaid, vote upon the removal of said county seat to said Center City.

That on the 9th day of November, 1860, at the said county of Chisago, the said votes cast upon the removal of the said county seat as aforesaid, were duly canvassed by the canvassing board duly qualified to perform the duty of canvassing the same. Whereupon it was by the said canvassing board found, and by the said board then and there duly declared, that a majority of all the legal votes cast at said election in said county was in favor of the removal of said county seat from Taylor's Falls to the said Center City, which said vote as found and declared by said board being as follows, to-wit: In favor of removal, 246 votes, and against removal, 201 votes.

That on and prior to the first day of November, 1860, you, the said Oscar Roos, were, and ever since have been, and now are the Register of Deeds of said county of Chisago, duly elected, qualified and acting as such.

That you, the said Oscar Roos, Register of Deeds as aforesaid, from and ever since the 29th day of November, 1860, and contrary to the statutes in such case made and provided, have kept, and still do keep and hold your office aforesaid, together with all the books, papers, and records belonging to your said office at Taylor's Falls in said county of Chisago, as the county seat thereof.

That you, the said Oscar Roos, Register of Deeds aforesaid, in violation and neglect of your duty in that behalf, and contrary to the statutes in such case made and provided, have hitherto wholly neglected and still do neglect to remove your said office to the said Center City, and there keep and hold the same as the county seat of said county of Chisago.

That the said Andrew Swenson did, on or about the 2d day of December, 1860, at the town of Taylor's Falls in said county, make demand of and request you, the said Oscar Roos, that you forthwith remove your said office from said Taylor's Falls to said Center City, and there hold the same as the county seat of said county of Chisago.

And that said Andrew Swenson has no adequate remedy in the ordinary course of the law.

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Now therefore, you, the said Oscar Roos, Register of Deeds of said county of Chisago as aforesaid, are hereby commanded that immediately after the receipt of this writ you do remove your said office to the said Center City in said county of Chisago, and that you there keep and hold the same as the county seat of your said county of Chisago, in pursuance of the statutes in such case made and provided, or that you show cause before our District Court of the First Judicial District of the county of Chisago, at the court house thereof, on the 15th day of October, 1861, at 10 o'clock in the forenoon of that day, why you have not done so, and do you then and there return this writ with your certificate of having done as you are herein commanded.

Hereof fail not, &c., &c.

The following is the answer to the writ:

And now before the Court here comes the Defendant Oscar Roos, and here brings and returns the writ of mandamus served on him in this proceeding, and for answer to the said writ and for cause unto your Honor showing why he hath not done as in the said writ he is commanded to do, the Defendant alleges, states, and declares,

That on the 5th day of September, 1860, there was not, and since that day there has not been any law of this State in force authorizing or providing for the removal of the county seat of said county from the town of Taylor's Falls in said county, to Center City in said county, or elsewhere.

That the writ in this case does not state any facts showing that under the laws of this State the said town of Taylor's Falls is not the county seat of said county, or that it is the duty of this Defendant to remove his said office and keep the same at said Center City.

That the statutes of this State, on *pages* 111–12 *of the General Statutes*, relative to the removal of county seats, is unconstitutional, in conflict with the constitution of this State, and void.

That the aforesaid statute has never been submitted to the electors of said county for their ratification or approval, and that for that reason the said statute is void and of no effect.

And that under the laws of this State in force before and

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since the first day of September, 1860, the said town of Taylor's Falls was and ever since has been and still is the county seat of said county.

That the aforesaid statute, on *pages* 111–12 *of the General Statutes*, was not at the next general election after the passage thereof, submitted to the electors of said county, and that the said statute has not, since the passage thereof, been adopted by a majority of the electors of said county.

Upon the hearing before the Judge it was ordered that the return to the writ of mandamus be quashed unless the Defendant amend the return thereto.

Defendant declined to amend, whereupon it was ordered that the writ of mandamus be made peremptory.

Points and Authorities for Appellant.

I.—The Defendant could not demur to the writ. *Stat.*, 633, *sec.* 11. And as the Defendant could not demur to the writ, he might by his return, submit that he was not bound by law to execute it, which submission being in the nature of a demurrer, should have been treated accordingly; that is, the point should have been argued and decided upon the sufficiency of the writ. *Tapping on Mandamus*, 404, (362).

II.—The writ of mandamus must clearly show upon its face, that it is the Defendant's duty to execute it. *Tapping on Mandamus*, 367, (322); while in this proceeding the writ did not state facts sufficient to show that by law it was the Defendant's duty to execute it.

III.—The return was sufficient and the Court erred in quashing it; and whether sufficient or not, the writ itself was defective in substance, and did not state facts sufficient to entitle the Plaintiff to a peremptory writ, even upon default. When a complaint does not state facts sufficient to constitute a cause of action, a judgment upon default will be reversed by the Supreme Court. *Tapping on Mandamus*, 355, (308) to 481, (382).

Points and Authorities for Respondent.

I.—The writ is sufficient, and shows clearly upon its face

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that it was the duty of the Defendant to obey it. *Compiled Statutes*, 111–12.

II.—The Defendant, by his answer to the merits, waived all defects in form, and irregularities in the writ.

III.—The Defendant, by his answer, admits the existence of the law upon the statutes, and also the regularity and sufficiency of the proceedings had under the law, as the same is alleged in the writ, the effect of which he seeks to avoid by denying the constitutionality of said law, thereby placing himself in the attitude of disobeying the laws and defying the authority of the Court by setting up his individual opinion and construction of the law, which, if permitted to do, would be subversive of all law and of the power and authority of the Court.

IV.—The Defendant has by his answer placed on record the fact that the law in question is in existence upon the statutes, and is thereby estopped to deny his duty to obey the writ. *Gould's Pleadings*, *p.* 153, *sec.* 168.

W. H. Burt, Counsel for Appellant.

L. R. Cornman, Counsel for Respondent.

By the Court—Flandrau, J.—The question presented by this appeal is one of very considerable importance to the State at large, and has enlisted our earnest endeavors to arrive at a correct determination. We have viewed it in all its legitimate bearings, and applied such rules of interpretation to the provision of the Constitution involved, as are sanctioned by law and judicial decision, with a desire on our part to sustain the act of the legislature brought into question, if possible, without doing violence to the organic law.

Previous to the adoption of our Constitution, the legislative power of the Territory was vested in the Governor and the Legislative Assembly. *Organic Act*, *sec.* 4. And no law could be passed by any other authority. In the year 1853, a law was passed by the legislature of the Territory, on the subject of the manufacture and traffic in spirituous liquors, the validity of which was left to be determined by a vote of the

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people. *Laws* 1853, *pp.* 7-13, *sec.* 19. The people in their primary assemblies adopted or ratified the law by a majority vote, and the courts of the Territory subsequently declared it void, as having been in effect passed by the people and not the legislature. I am unable, however, to find any record or report of the decision, and am not certain that the question was passed upon by the court of last resort. The rule is a familiar one, however, and has received the sanction of the courts of other States. *Parker vs. The Commonwealth*, 6 *Barr. Rep.* 515-16.

During the Territorial existence of Minnesota, a very great evil had grown up in the legislation of the country, consequent upon the feverish excitement that prevailed for the creation of towns and cities, and the speculation in lots and lands. It was the constant practice of the legislature to change county lines, and the county seats of counties from one town to another, at the solicitation of interested parties, without a full understanding of the wishes and interests of the people of the counties affected. Instances even occurred where such removals were carried through the legislature without the knowledge of that body, by inserting clauses in bills, surreptitiously, the title of which indicated entirely another purpose. As long as the power to change county lines, and remove county seats resided in the legislature alone, and its authority was unrestricted, it was found that its action on the subject was liable to abuse.

When the Constitution was framed this subject received the careful consideration of the Convention, and the discussion upon what is now *section* 1 *of article* 11 of the Constitution was based almost entirely upon the abuses that had previously existed in the legislation of the Territory, and it was the almost universally expressed opinion of the members, that some check should be imposed upon the legislature in regard to making changes in county lines and county seats; and it was decided that the most just and practicable method would be to require the sanction of the citizens of the counties to be affected, to the legislation, before it could become operative. See the Debates of the Convention presided over by President Sibley, from page 467 to 480; also those of the Convention

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presided over by President Balcombe, from page 259 to 269.

The result of these debates was the following section of the Constitution. *Art.* 11, *sec.* 1:

"The legislature may, from time to time, establish and organize new counties, but no new county shall contain less than four hundred square miles; nor shall any county be reduced below that amount; and all laws changing county lines in counties already organized, or for removing county seats, shall, before taking effect, be submitted to the electors of the county or counties to be affected thereby, at the next general election after the passage thereof, and be adopted by a majority of such electors. Counties now established may be enlarged, but not reduced below four hundred square miles."

The legislature, at the session of 1858, passed a general law for the removal of county seats, (*Stats. Compd. ed. p.* 111,) by which it is provided that when a number of voters in a county, equal to half the highest number of votes polled at the general election preceding, shall petition the County Commissioners for a change of the county seat, the Commissioners shall submit the question of change to the electors, &c., and a majority voting in favor of the change shall effect it, &c. This act was designed to remain in force and apply to all future cases. Now, it will be seen that by the provisions of this law, the legislatare does not act directly upon the question of the change of any particular county seat at all, but the whole question is left to the people of each county, and the county seat may be removed and the legislature know nothing about it.

Let us see whether the Constitution intended to work any such change as the legislature has introduced. In the first place, there was no way, as we have shown, to obtain the voice of the people, directly, upon any subject of legislation, as long as the legislative power was vested solely in the legislature. That body was not permitted to delegate its trust to the people, or any one else. It became necessary, therefore, in order that the people might have a voice directly in any subject, properly one of legislative cognizance, that some provision should be made for it in the Constitution. All other

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subjects of legislative jurisdiction are conferred upon that body, without qualification. *Art.* 4 *Const.* But the people were not willing to allow the legislature absolute control over the question of county lines, in counties that were "already organized," nor over the removal of county seats, as had previously been the case, and as would have yet been so, had nothing been said in the Constitution about it; because under our system of government, State constitutions are not creative, but restrictive instruments, and the legislature of a State has as extensive powers as the Parliament of Great Britain, subject only to the restrictions imposed upon it by the Constitution of the United States, and the particular state in which it acts. *Board of Supervisors of Ramsey Co. v. Heenan*, 2 *Minn. R.* 330-2. The purpose of the Constitution was to impose a restriction upon the legislature, in acting upon a certain class of subjects. It was not to deprive that body of any participation in them whatever, and confer the jurisdiction upon some distinct tribunal. It was more in the nature of granting to the people of the several counties a veto power upon its acts, than of conferring the power in the first instance upon the people. The words are "all laws changing county lines," &c., "or for removing county seats," which must be read "or all laws for removing county seats," "shall before taking effect, be submitted," &c., "at the next general election after the passage thereof, and be adopted," &c.

It takes a law to change a county seat or a county line now, just as it did before the Constitution was adopted, and the people have no more power to originate laws now than they ever had, nor does the Constitution, in this particular instance, confer upon the people any power whatever over, or participation in, the passage of these laws. The law must be passed by the legislature making the change in the line, or the county seat, just as formerly; and it is as perfect a law as any other when it leaves the hands of that body. It is, however, made to take effect upon the happening of a certain contingency, which contingency is an approbatory vote of the people. The law, upon the happening of the event upon which its effect depends, at once becomes operative *proprio vigore.* It was as much a law prior to the vote of the people as sub-

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sequent to that event, its operative force being suspended merely; its vitality being dormant. It is precisely the same case as the passage of a law by the legislature, made to take effect upon the happening of any other event, such as a future day, which is the most usual case. The law is passed, and the legislature declare that it shall take effect and be in force from and after some future day; or after it shall have received a certain notoriety by a given number of publications in a newspaper. Or suppose the legislature to anticipate a declaration of war by some foreign power. It passes a military bill, calling into action a vigorous militia system, incompatible with a peace establishment, but necessary as a war measure. The law is made to take effect upon the contingency of war being declared. If war is declared, the law at once becomes operative, not by the act of the foreign government in declaring war, because that can have no influence upon the legislation of our State, but by the vital force infused into the law by the legislature at the time of its passage, which force is confined and quiescent until called into life by the happening of the event upon which it is made to depend. Such laws (if I can be permitted a figure of the times) may be assimilated to shells, or other military projectiles, which contain within themselves all the forces necessary for the complete fulfilment of their purpose, but whose energies are latent, suspended, and remain at rest until the application of the match. The event may never transpire, nor the match be applied, yet they are none the less perfect of their kind when they leave the hands of the artisan.

We do not think the framers of the Constitution meditated any such change as the legislature has adopted. They did not mean that a county seat should be changed without the sanction of the legislature, any more than that a county line should be subject to alteration, solely at the will of the inhabitants of the county. They only intended to prevent the legislature from making laws of this peculiar nature, contrary to the desires and interests of the people of the locality. They have not said to the legislature—you shall change a county seat whenever the people, or a majority of them, shall desire it: but merely that you shall not make such change unless

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they do approve your action. The legislature still possesses full power over the subject, in one sense, because no change can be made without that body originating the measure and sanctioning it by the passage of an act.

The counsel for the Defendant in this case insists that the State at large have an interest in the location of county seats, as well as the local inhabitants of the county. The position is certainly true when considered either with reference to the subject matter involved, or philosophically, as a matter of governmental policy. The county seat is the point at which public justice is administered, and in this respect may, and constantly does, affect the rights and interests of citizens from all parts of the State, as suitors, witnesses and otherwise. It is also the depository of all county records, involving taxes, titles, and other matters of general public interest; and in this view cannot be regarded as entirely a local matter. On the other hand experience has proven beyond doubt, that the most irresponsible and dangerous of all tribunals to invest with legislative powers, is the people in their primary action at the ballot-box. They have seldom failed to burthen themselves with crushing debts for the most fantastic and speculative purposes, whenever the power has been confided to them. The history of our western cities, counties and towns, for the past ten years, is a standing monument of their willingness to run into all kinds of excesses, in the hope of temporary relief from pressing embarrassments, generally ending in serious distress and permanent detriment to whole communities; sometimes in discreditable repudiations. It may be said that such matters concern themselves and they are the best judges. Such, however, is a very unwise and unstatesmanlike view of the subject, and has a tendency to subvert the advantages of a representative, and restore all the evils of a pure democracy, to our system of government. The Constitution should be very explicit in inaugurating changes of this character, to justify the courts in giving such effect to its provisions. This case is disembarrassed, however, of all real difficulties, as the words of the Constitution do not admit of any just construction that will allow the legislature to confer the power in these cases entirely upon the people. The legislature must,

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in every case of a change of county lines in counties "already organized," or for removing a county seat, pass a special act, to take effect upon its adoption by the electors of the county, &c., at the next general election after its passage. The act of March 18, 1858 (*Comp. Stats.* 111-12) is in conflict with both the spirit and letter of the Constitution, and of no force.

The counsel for the relator insists, however, that the Defendant is estopped from calling into question the validity of the act, because he had referred to it in his answer or return to the writ of mandamus, as an act of the legislature, or law, and cannot now allege that it is not such; in other words, that he has adopted it. We cannot see the force of this position. It would be difficult for the Defendant to make his point upon the validity of the supposed law, unless he could call the attention of the Court to it by reference to its title, or its place in the statute book; and further, we do not think it is a matter in which the Defendant could estop himself by any act of adoption. If the law is void, he may raise the question here or anywhere else, on the trial, or in arrest of judgment.

The order or judgment making the writ of mandamus peremptory, is reversed.

ATWATER, J, filed the following dissenting opinion:

The evil which had grown up under our Territorial organization, with regard to changing county lines, and removing county seats, has been correctly stated by my brother Flandrau, but I cannot agree with my associates in holding that the law of 1858, above referred to, is unconstitutional. It will be observed that the only objection urged to that statute is, that it is in conflict with *section* 1 *of article* 11, *of the Constitution*. That the subject matter of the act of March 18, 1858, (*chap.* 2, *p.* 111, *Comp. Stat.*,) is within the scope of legislative action, (unless restricted by the organic law,) is conceded. And if so, then the Legislature had the same authority to pass a general act, regulating the removal of county seats, that it had to enact a special law providing for the removal of a particular county seat. And so too, is it within the scope of legitimate legislative action, that without interfering directly as a legislative body in the removal of county seats, it should provide the means whereby the people of each

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county may locate their county seat, without any interference by the Legislature in the matter. In other words there is nothing in the nature of the case, or of the subject matter, that renders it necessary, or even appropriate, that the legislature should interfere directly in the removal of county seats.

On the contrary, the very evil which had grown up under legislative action on this subject, proves conclusively the propriety of removing the subject as far as possible, from legislative interference. And this unquestionably was the object, both of the provision in the constitution, and of the statute of 1858, only the latter has attained the object more completely than the former. And although previous to the adoption of the constitution the legislature had the power, and had often exercised it, of changing county seats, without regard to the wishes of the inhabitants of the county, yet the power itself is opposed to the whole theory of our republican form of government, which is, that of self government for each state and municipality—the absolute right of managing its local concerns, without interference from strangers. This principle is violated in every interference by the legislature in the removal of a county seat contrary to the wishes of the people of a county. No sound reason can be given why the people of a county have not, and should not have the right and privilege of locating their seat of government without interference by the people of other sections of the State.

It is said that the people of the State at large have an interest in the location of the respective county seats. It is true they have what may be termed an indirect interest in the question, but not such an one as takes the case out of the application of the principle above referred to. The people of the State have an interest in having competent and efficient county officers elected in each county, in having good roads maintained, in the moral and intellectual training of the people, and in numerous other matters which might be named, but all of which are left for the citizens of each county to manage for themselves, and any interference in which, by the inhabitants of other sections of the State, would justly be regarded as an infringement upon their rights, which would not for a moment be tolerated.

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Nor will it do for the judicial tribunals to take away these rights on the ground that the people are incompetent to exercise them. Our only business is to declare and interpret the law, and not to limit, or render it inoperative, from fear that the people may not wisely exercise their rights under it. Whatever differences of opinion may exist as to the policy of allowing the people the right of self-government, or as to the extent to which the right should be allowed, the question cannot properly be here discussed, nor the law administered with reference to our own views of what is right and proper.

Let us now examine the law of 1858, and see whether it is in conflict with *sec.* 1 *of art.* 11 *of the Constitution.* Unless it is, it is admitted that it must be sustained. There is no provision in that act for submitting the same to the people for ratification, and from the nature of the case there is no necessity for such submission. For it is not an act providing for the removal of any county seat, but only providing a general mode in which the people of a county may proceed to change or locate a county seat. Now the constitution contains no prohibition of legislation of this nature. The legislature may now, as before, enact a law changing a county seat. But if it does so, the law before taking effect, shall be submitted to the electors of the county to be affected thereby, &c. It is an entire mistake to suppose that this provision of the constitution requires a special act to change or locate a county seat. Neither the language or spirit of that instrument, in my judgment, can receive such a construction. And the evil which it is admitted the constitution only aimed to remedy, is even more effectually prevented by the act, than it would have been under the law as it formerly existed, with the restriction imposed by the organic law. For if it be true that the constitution is intended to forbid the removal of county seats, except by special act of the legislature, that body must still be subject to all the corrupt influences which were formerly brought to bear in favor of or against the removal or establishment of a county seat. It is true the people of a county are not, as before, left entirely in the power of the legislature, to suffer the evil consequences of such cor-

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rupt legislation, and for that reason the motive for it may to some extent be diminished. But still it would exist, and from the nature of the case, these corrupt influences would be brought to bear in almost every contested case of location or change of a county seat. The act of 1858 strikes at the very root of the evil. It takes the matter out of the hands of the legislature, and places it in the hands of the people of the county to be affected by it, where it properly belongs. And while it effectually bars one pregnant source of evil, it is in entire harmony with the whole theory and practice of municipal government in this country, in accordance with reason, justice, and the spirit of the organic law, and not repugnant to its letter, and I see no tenable ground on which it can be set aside.

That an act of the legislature cannot be set aside as unconstitutional, unless its incompatibility with the constitution is clear and unequivocal, is an elementary principle, recognized by authorities so numerous that it is unnecessary to quote them. I think this principle is violated in holding the act in question unconstitutional. This must be so, unless the constitution requires a special act to change or locate a county seat. It does not in terms so require, nor in my judgment can it have such meaning by any fair construction. The legislature having still the power to locate or remove county seats, whenever such power is exercised, the constitution only requires that the law be submitted to the people before taking effect. It is at best only by doubtful implication, that it can be said that the constitution designed to take from the legislature the power, which it formerly enjoyed beyond question, of passing an act of this kind. And by another equally well settled rule of construction, clauses in the organic law, restrictive of rights before enjoyed, must be strictly construed, and cannot be extended by implication to embrace more than is covered by the exact terms of the instrument. With how much more force does the rule apply to a case like the present, when the effect of giving an extended meaning to the clause is to nullify a law, which completely remedies the evil aimed at by the framers of the constitution, and secures to the peo-

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ple the exercise of a right which is in entire accordance with the system of municipal government which prevails in this country. For these reasons therefore, I think the order of the District Court should be affirmed.

CALEB O. DAUGHADAY, Plaintiff in Error, against JOSEPH A. PAINE, et al., Defendants in Error.

ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

A vendor taking security upon the land sold, does not, by that act, waive his equitable lien, provided he has expressly agreed with the purchaser that it shall be retained. Where such agreement has been made, the lien will attach to the property in the hands of the vendee, and all persons claiming under him with notice of the agreement.

The owner in fee of land, in conveying the same by deed, may limit or restrict the estate granted in any manner he chooses, (not repugnant to the grant intended) and the grantee will take only the estate as limited.

Whenever the instruments forming the purchaser's chain of title, disclose an incumbrance, he is equally bound by such notice, as by the record of the instrument itself, creating or evidencing the incumbrance, or actual notice of the same, as in case of vendor's lien without mortgage.

A purchaser who relies upon an *abstract of title*, which does not exhibit the contents of the conveyances forming the chain of title, will be deemed guilty of *crassa negligentia* and the fact that such is the usual custom of the country in the transfer of real estate, raises no equity in his favor.

The facts found by the Court below are briefly as follows:

The Plaintiff in Error being the owner of lots two and three in block one of Patterson's Addition to Saint Paul, and being desirous of making an advancement to his daughter, Mary E. Goodrich, of all the said lots were worth over $1,000, conveyed the same to his daughter, Sarah E. Daughaday, then residing with him in the State of New York, on the 30th of December, 1854, and took back a mortgage from said Sarah E., on the same property, of the same date as the said first conveyance, to secure the sum of $1,000, with interest, and said Sarah E., at the same time, conveyed said property to her sister, Mary E. Goodrich, who was then in Saint Paul, the

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said deed containing a recital of the mortgage to Plaintiff, and being subject thereto.

The deed from Plaintiff in Error to said Sarah E., and the deed from Sarah E., to Mary E., were delivered to James D. Goodrich, husband of said Mary E., and by him taken to Ramsey county, Minnesota, in which said lots are situated, and were recorded in the office of Register of Deeds of said county, on the 11th of January, 1855. The mortgage above mentioned was forwarded to Ramsey county, for record, three or four days after its execution, and was recorded on the 26th of January, 1855, and did not come into the possession of the Register of Deeds until that time.

That said deed to Sarah E. was executed without the request or knowledge of the said Mary E., and that she made no promise to pay the said $1,000; that said mortgage was not made with the knowledge or assent of said Mary E., nor has she, at any time, assumed, or promised to assume, the payment of the sum therein specified.

That on the 22d of January, 1855, said Mary E., and James D. Goodrich, her husband, made, executed, acknowledged and delivered to one Abram Bennett, a mortgage upon said lots, to secure the payment of a note of that date, for $930, signed by James D. Goodrich, as set forth in the complaint.

That at the time of taking said mortgage, and up to the time of the commencement of this suit, the said Bennett had no actual knowledge or notice of the execution or existence of the mortgage from Sarah E. Daughaday to the Plaintiff, or of the recital or mention of said mortgage in the deed from said Sarah E. to the said Mary E., but took the same in good faith, believing it to be a first lien on said premises.

That said mortgage to Bennett was duly recorded in the office of the Register of Deeds of said Ramsey county, on the 22d of January, 1855.

That on the 11th of October, 1855, said Bennett, for a valuable consideratien, duly assigned and transferred said mortgage and note to Isaac Van Etten and Michael E. Ames, and that neither at the time of said assignment, nor until the commencement of this action, had said Van Etten or said Ames any actual knowledge or notice of the execution or existence

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of said Plaintiff's mortgage, or of the recital or mention of the same in the deed from said Sarah E. to said Mary E.; that said Ames and Van Etten did not, nor either of them, examine the records of said Register's office, but relied upon an abstract of title to said lots, which abstract did not exhibit the contents of the conveyances in the chain of title to said premises.

That on the 22d of September, 1856, Ames and Van Etten, for a valuable consideration, duly sold, assigned and transferred said mortgage and note to Joseph A. Paine, Defendant in Error, and that neither at the time of said assignment, nor until the commencement of this action, had the said Paine any actual knowledge or notice of the execution or existence of Plaintiff's mortgage, nor of the recital or mention of the same in the deed from Sarah E. to Mary E.

That said Defendant's mortgage was duly foreclosed, and said lots purchased by him upon said foreclosure, on the 26th of November, 1857, and that he thereafter received a Sheriff's deed therefor according to law.

And the Court finds, as conclusions of law applicable to the foregoing facts: That the record of said deed from Sarah E. to Mary E., is not constructive notice of the recital therein of said mortgage to the Plaintiff, so as to charge said Bennett, Ames and Van Etten, and the Defendant Paine, with knowledge of the existence of said mortgage, or to put them on inquiry concerning the same.

That the Defendant's mortgage is the prior lien on said premises, and that Plaintiff is not entitled to the relief demanded in his complaint, and the action is ordered to be dismissed.

Thereupon a judgment of dismissal was entered, and the same is now brought by writ of Error to this Court for review.

Points and Authorities of Plaintiff in Error.

I.—The conveyance to Mrs. Goodrich was a conditional conveyance, and the grant was subject to the condition of defeasance in the mortgage, and subject to be defeated there-

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by. The condition having been broken, the legal title is divested, leaving in the assignee of Mary E. Goodrich the equitable right only of redemption. Therefore the question of notice is not material.

II.—The recitals in the deeds, directly in the chain of title under which Defendant claims, are notice of the facts and matters recited, no matter in what part of the deed the recital appears. Whatever appears upon the title possesses and forms an integral part of the title itself. *Hall vs. Haythorp*, 3 *Bland.* 531; *Haythorp vs. Hooks' Admr.* 1*st Gill & J.*, 270; *Oliver vs. Pratt*, 3 *Howard*, 333; *Mason vs. Fagan*, *Walkers Ch.* 259; *Johnson vs. Gwathey*, 14 *Little*, 317; 3 *Iredell*, 535, 7 *Conn.* 324; *Heenan vs. Blackwell*, 6 *B. Monroe*, 67; 7 *B. Monroe*, 312; 10 *Smedes vs. Marsh*, 312 *and* 143, 7 *B. Monroe*, 116; *Walker's Chancery*, 459.

III.—Such notice by recital is of the most conclusive nature, and is unsusceptible of being explained away or rebutted. It is notice by presumption of law and cannot be contradicted. *Adson vs. Allen*, 1 *Yerger*, 360; *Graves vs. Graves*, 1 *A. K. Marshall*, 161; *Morris Ex. v. Blackad*, 6 *B. Monroe*, 67; 1 *Hoffman*, 158; *Fuller vs. Jackson*, 6 *Wendell*, 213; *McKinmun vs. Mail*, 14 *Texas*, 318.

IV.—If a party has notice (constructive), such as is patent in the deeds through which he claims, he is chargeable without a fraudulent omission of duty. In case the party neglects to examine such deeds, such omission cannot be in good faith, and therefore the party is estopped by the recital. The question is not as to whether the party had actual notice, but whether it is not fraudulent on his part to omit an actual examination of the deed under which he claims title. 31 *Eng. Chancery Law and Equity Reports*, 89, *and cases above cited;* 14 *B. Monroe*, 277; *Tieman vs. Thomas*, 14 *Texas*, 318.

V.—The question is not as to whether the vendor has lost his lien, by the taking of the mortgage, for the notice is of the existence of the mortgage, and also that it is for unpaid purchase money; the deed under which above Defendant Paine claims title being subject to the condition of defeasance, leaves only an equitable title in Defendants, and Plaintiff's equity is superior and coupled with a legal interest.

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Points and Authorities of Defendants in Error.

This case presents but two questions for the consideration of the Court, namely:

First—Did the mortgage from Goodrich and wife to Bennett obtain priority over the mortgage of the Plaintiff, by being first recorded?

Second—Has it lost that priority by the subsequent recording of Plaintiff's mortgage?

Considering these questions in the above order, we say in reference to the first of them:

I.—The Plaintiff cannot claim the equitable lien of a vendor for unpaid purchase money.

1. Because there was no agreement or promise by any one to pay the amount which his mortgage was given to secure, and that amount therefore was not unpaid purchase money.

2. If any such lien might have been available in his favor, it was relinquished by his taking a mortgage as security.

3. The lien of a vendor for unpaid purchase money only exists as between vendor and vendee, and purchasers with notice of the same, and does not affect *bona fide* purchasers for a valuable consideration. *Willard's Eq. Jur., pp.* 441, 443, *and cases cited; Bayley vs. Greenleaf, 7 Wheat. R.*, 46; *Selby vs. Stanley*, 4 *Minn. R.*, 65; 4 *Kent's Com.*, 153, 154, (*marginal*) *note* "*a.*"

II.—The statute determines this question in the affirmative, if Bennett purchased in good faith and for a valuable consideration. *Revised Stat. of Minn., ch.* 46, *p.* 213, *sec.* 24; *Comp. Stat. of Minn., ch.* 35, *p.* 400, *sec.* 24.

The Plaintiff in Error relies, to rebut this good faith, upon the naked fact of the recital in the deed to Mrs. Goodrich; and in reference to this point we claim,

1. That the Court below having found from the evidence that the mortgage to Bennett was taken by him in good faith, and for a valuable consideration, and was first recorded, the provision of statute above quoted makes the Plaintiff's mortgage void as against Bennett.

As proof of notice would take a subsequent purchaser whose

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deed was first recorded out of the benefit of the registry act, so proof of good faith or want of notice brings him within it. *Hine vs. Dodd*, 2 *Atkins' R.*, 275; *Jolland vs. Stanbridge*, 3 *Vesey's R.*, 478; *Wyatt vs. Barnwell*, 19 *Ves. R.*, 435; *Day vs. Dunham*, 15 *Johns. R.*, 555; *Johnson vs. Reardon*, 3 *Md. Ch. Decisions*, 357; *The U. S. Ins. Co. vs. Shriver et als.*, 3 *Md. Ch. Decisions*, 381.

2. The record of Plaintiff's mortgage and that alone under our statute could be constructive notice of such mortgage.

To make the casual recital in the deed to Mrs. Goodrich constructive notice to defeat Bennett's mortgage, would render the recording of Plaintiff's mortgage entirely useless for any purpose whatever, and would be breaking in upon the letter and spirit of the registry act and opening the door to that fraud and uncertainty which it is the special office of that act to guard against and defeat.

Our statute provides for recording deeds and mortgages in different books, and for keeping separate books of index. *Rev. Stat. of Minn., p.* 63, *sec.* 5, *amended by Sess. Laws of* 1854, *p.* 61, *sec.* 4; *Comp. Stat. of Minn., p.* 157, *sec.* 5.

On these points we refer to 4 *Kent's Com.*, 169, 173, (*marginal*); *Willard's Eq. Jur.*, 254; *Dart's Vendors & Purchasers*, 402; *White vs. Moore*, 1 *Paige Ch. R.*, 551; *Grimstone vs. Carter*, 3 *ib.*, 421; *Hodgson vs. Dean*, 1 *Eng. Ch. R.*, (2 *Simon & Stuart*,) 220; *Jackson vs. Van Valkenburgh*, 8 *Cow. R.*, 260; *McMechan vs. Griffin*, 3 *Pick. R.*, 149; *Bush vs. Golden*, 17 *Conn. R.*, 594; *Jackson vs. Elston*, 12 *Johns. R.*, 452; *Jackson vs. Given*, 8 *ib.*, 137; *Johnson vs. Reardon*, 3 *Md. Ch. Decisions*, 357; *The U. S. Ins. Co. vs. Shriver*, *ib.*, 381; *Carr vs. Calleghan*, 3 *Litt.*, (*Ky.*) 365.

In both of these Maryland cases, as well as in many of the others, it is distinctly held that a subsequent purchaser cannot be affected by a prior unregistered deed, except on proof of such actual notice as would amount to fraud.

3. Even were the recital in the deed held to be presumptive evidence of notice, that presumption falls before the affirmative proof, admissions and finding of the Court, to the full effect that Bennett had no notice or intimation of such recital, or of the existence or execution of the prior mortgage.

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And when the good faith of a purchaser is the only question for consideration, and that is affirmatively proved and admitted, how can it be urged that the reverse of this, namely, bad faith or fraud, exists at the same time? A court of equity will not exert its ingenuity to charge a party with fraud by any legal fiction or technical hindrance to the real truth, where that truth clearly establishes his actual good faith.

4. Should it be held that Bennett was bound to take notice of the deed to Mrs. Goodrich, this could only extend to the deed proper and not to the recital of collateral matters. This recital is no part of the deed; it is not a description or adjunct of the grantor, grantee, or thing granted. It is a matter solely between Sarah E. Daughaday and Mrs. Goodrich; a parenthesis inserted for the purpose of saving the former from her covenants against incumbrances: the title to the land passed the same as though the deed had contained no such recital. As between the immediate parties to the deed the recital had the effect of placing Mrs. Goodrich in the precise position of her grantor, and she held the land subject to the mortgage, but this lien became subjected to that of Bennett the moment he became a purchaser for a valuable consideration, without notice, and placed his conveyance on record. The first point made by the counsel for Plaintiff in Error can need no other answer than is above suggested. *Willard's Eq. Jur., p.* 256; *Dey vs. Dunham*, 2 *John. Ch. R.*, 182; *Jackson vs. Burgott*, 10 *John. R.*, 457, (*Kent, Ch. J.*); 4 *Kent's Com., pp.* 169, 170-71-72 (*marginal*).

II.—The second question which we proposed to discuss, is whether the mortgage of Bennett lost its priority by the subsequent record of Plaintiff's mortgage, but as the counsel for the Plaintiff do not raise this point, nor rely upon it, we shall simply cite a few of the numerous authorities bearing on this question; and we believe there are no contrary ones.

It is admitted and found by the Court below that the assignees of the Bennett mortgage purchased the same for a valuable consideration and without actual notice of Plaintiff's mortgage, or of the recital in the deed to Mrs. Goodrich, and therefore such assignment carried with it all the rights of Bennett, and could not be affected by the recording of Plain-

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tiff's mortgage subsequent to Bennett's purchase. *Connecticut vs. Bradish*, 14 *Mass.*, 296; *Trull vs. Bigelow*, 16 *ib.*, 406; *Boynton vs. Rees*, 8 *Pick.*, 329; *Tresscott vs. King*, 6 *Barb. S. C. R.*, 346; *Hooker vs. Pierce*, 2 *Hill*, 650; *Jackson vs. McChesney*, 7 *Cow.*, 360; *Jackson vs. Van Valkenburgh*, 8 *ib.*, 260; *Mallory vs. Stodder*, 6 *Ala.*, 801; *Wood vs. Chapin*, 3 *Kernan*, 509; *Varrick vs. Briggs*, 6 *Paige*, 328; *Willard's Eq. Jur.*, 249; *Jackson vs. Given*, 8 *Johns.*, 137.

SMITH & GILMAN, Counsel for Plaintiff in Error.

BOND & CLARK, Counsel for Defendants in Error.

By the Court—ATWATER, J.—In *Selby vs. Stanley et als.*, 4 *Minn.*, 65, this Court recognized the doctrine of the vendor's lien for the purchase money under certain limitations, and laid down the following as the correct rule on this subject, viz., "that whenever the vendor shall take any security for the purchase money upon the land sold, or upon any other land, or by pledge of chattels, or by the absolute or conditional obligation of a third person, or any other security than the personal obligation or promise of the vendee, such fact shall be deemed conclusive of his intention to abandon his equitable lien, unless he retain it by express agreement." A vendor taking security upon the land sold, does not, therefore, by that act, waive his equitable lien, provided he has expressly agreed with the purchaser that it shall be retained. Where such agreement has been made, the lien will attach to the property in the hands of the vendee, and all persons claiming under him, with notice of the agreement. The facts found by the Court below show that it was expressly agreed by and between the Plaintiff in Error, and Sarah E. Daughaday, to whom he conveyed the premises, that the amount of $1000 should be and remain a lien on the premises for that amount of purchase money, and that it was not intended to waive the same by taking the mortgage. As between the Plaintiff in Error and his vendee, Sarah E. Daughaday, there can be no doubt but that the vendor has retained his lien upon the property, and the only question is whether subsequent purchasers

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have had such notice of this lien, that their rights in the premises must be postponed to those of the Plaintiff in Error.

The mortgage from Sarah E. Daughaday to the Plaintiff in Error was not filed for record at the time Goodrich mortgaged to Bennett. But the deed from Sarah E. to Mary E. Goodrich recited this mortgage for the purchase money, or at least the deed in terms was given subject to the mortgage. The Court below held that this reference in the deed to the mortgage of the Plaintiff in Error, was not constructive notice to Bennett and assigns of the existence of that mortgage, and that consequently the mortgage of the Defendant in Error took precedence of that given for the purchase money as a lien on the premises.

The first question presented on the facts here disclosed is, what estate passed to the grantee of Sarah E. Daughaday under the deed above mentioned? That deed could convey no greater interest than the grantor herself possessed, which was the legal estate subject to the equitable lien or right of the Plaintiff in Error to the premises, to the extent of one thousand dollars. Mary E. Goodrich therefore did not take the whole legal and equitable interest in the premises, nor did the deed from her grantor purport to convey the entire estate, but expressly excepted from the grant this equitable lien for the purchase money. And the same rule must of course apply to the grantee of Mary E. Goodrich. This principle was recognized in *Greenleaf vs. Edes*, 2 *Minn.*, 264, and we think is applicable to all like cases of the transfer of real estate, where the recording acts have not given rights to subsequent purchasers not actually acquired from the grantor. The owner in fee of land, in conveying the same by deed, may limit or restrict the estate granted, in any manner he chooses (not repugnant to the grant intended), and the grantee will take only the estate as limited.

But although the Plaintiff in Error may have retained a vendor's lien on these lots, he cannot enforce the same as against the mortgage to Bennett, unless the latter has had actual or constructive notice of the same. The Court has found he had no actual notice of the existence of the mortgage in favor of the Plaintiff in Error, and it remains to con-

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sider whether the recital of this mortgage in the deed from Sarah E. Daughaday to Mary E. Goodrich was such notice as should postpone the lien of the Respondent's mortgage to that of the Plaintiff in Error. The reference to that mortgage in the deed to Mary E. Goodrich, is as follows, viz.: After the description of the lots, the instrument proceeds: "subject to a certain indenture of mortgage bearing even date herewith, made and executed by the party of the first part hereto, to Caleb O. Daughaday of the said town of Ripley, to secure the payment of the sum of $1000, parcel of the purchase money of the land above described, and interest thereon, payable, the said principal sum at or before the expiration of five years, and the said interest annually from the date of said mortgage," and warranting and defending against all, "except as against said mortgage above referred to." The Court has found as a fact that Bennett "had no actual notice or knowledge of the recital of said mortgage in the deed from said Sarah E. to said Mary E., but took the same in good faith, believing it to be a first lien on said premises." And the ground of the decision of the Court below as we understand it, was not that the recital was not in terms sufficient to give notice of the mortgage, but that the mortgagee was not bound to take notice of the recital in the deed. If he was, then the finding that the mortgage was taken in "good faith," will not aid the Respondent, but he will be equally concluded as if the mortgage itself were on record.

From as careful an examination as I have been able to give to this question, I am of the opinion that a purchaser of real estate is bound by notice of a vendor's lien, disclosed in the instruments forming his chain of title. Looking at the question as an original proposition, aside from authority, it seems contrary to reason and good sense that a party should be excused from knowing the contents, and the whole contents of his title deeds. The purchaser has possession of these title deeds (through the records) to all intents and purposes as fully as if they were delivered into his own hands. The law requires them to be recorded in full, and not merely certain portions, as names of parties, consideration or description. If this statement in the deed of the incumbrance existing on

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the premises, had the effect to limit the estate in the hands of Mary E. Goodrich, so that she could not have held the entire estate free from the equity of the Plaintiff in Error, then it is difficult to see how the Defendant in Error stands in any better position than she does. For Bennett and his assigns had precisely the same notice both in manner and substance that Mrs. Goodrich had. It is admitted by the Counsel for the Defendant in Error, that "as between the immediate parties to the deed the recital had the effect of placing Mrs. Goodrich in the precise position of her grantor, and she held the land subject to the mortgage." It is true Mrs. G. was not a purchaser for a valuable consideration, but that is not given as the reason why she is bound by the recital in the deed, but because (in the language of counsel,) "this recital is no part of the deed; it is not a description or adjunct of the grantor, grantee, or thing granted." This position we hold not tenable, as the recital is in the nature of an exception or limitation of the estate granted.

The point here raised is, not whether the mortgage of Bennett, having been first recorded, takes precedence of the unrecorded mortgage of Daughaday, for if there were no question of notice, there could be no doubt under the statute as to priority; but whether the recital in the deed of Mrs. Goodrich, of the mortgage to Plaintiff in Error, was constructive notice to Bennett and his assigns. And upon this point an examination of several of the authorities cited by the counsel for the Respondent, shows that they are not applicable. The doctrine discussed in 4 *Kent's Com.*, 169, 173, is that of the effect of prior registry, with or without notice, and not as to what constitutes notice. In 4 *Kent's Com.*, 460, it is stated that "the general rule is, that all parties to a deed are bound by the recitals therein, and they operate as an estoppel, working on the interests in the land, if it be a deed of conveyance, and binding both parties and privies, in blood, in estate, and in law." And see also 1 *Greenleaf's Ev., sec.* 23, *and cases cited.* In the reference to *Dart on Vendors and Purchasers*, 402, it is stated that "notice of an unregistered security must, in order to affect a purchaser claiming under a registered instrument, be actual notice affecting him with fraud," but the ques-

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tion here is not as to actual but constructive notice from the record, which if it exists is equivalent to actual notice.

In *White vs. Moore*, 1 *Paige Ch. R.* 551, it was held that "a deed absolute on its face, if intended only as a mortgage or security for the payment of money, whether accompanied by written defeasance or not, must be recorded as a mortgage in order to protect the holder against a subsequent *bona fide* mortgagee or purchaser of the premises," a principle which is not here applicable, as it is not contended that the deed to Mrs. Goodrich was intended as a mortgage. The same doctrine is stated in *Grimstone vs. Carter*, 3 *Paige Ch. R.* 421, and in *Willard's Eq. Jur.* 254, *and* 15 *J. R.*, 555; but neither those cases, nor those of *Jackson vs. Elston*, 12 *J. R.*, 452, and *Jackson vs. Given*, 8 *John.* 137, meet the point as to whether a recital in a deed is a notice of an unregistered mortgage.

In *Dart on Vendors and Purchasers*, 407, *et seq.*, numerous cases are cited as to the extent of notice by way of recitals, and some of them go farther than is claimed in this case, in behalf of the Plaintiff in Error. It is there stated that "in all cases where a purchaser cannot make out a title but by a deed which leads him to another fact, whether by description of the parties, recital, or otherwise, he will be deemed conusant thereof; for it was *crassa negligentia* that he sought not after it," citing 2 *Binn.*, 466; 6 *Binn.*, 119. And also, "if a man agrees to purchase under limitations in a deed which makes it necessary upon that transaction, for him to look into that deed, and that deed contains recitals of judgments affecting the lands he had so agreed to purchase, he is bound by those judgments, for he had a right to see the whole deed under which he purchased, and therefore must be taken to have seen the whole, and must consequently be presumed to have taken notice of everything contained in it, affecting his purchase;" citing *Morris vs. Vanderen*, 1 *Dall. Rep.* 64-67. In *Cuyler vs. Bradt*, 2 *Caines' Cases in Error*, 326, it was held that a conveyance, with a recital of the intent of a purchase, is a conveyance with notice, and the grantee takes, subject to trusts implied as well as expressed." In *Jackson vs. Neely*, 10 *John.*, 374, it was held that "where a deed, reciting a let-

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ter of attorney by virtue of which the conveyance was made, was duly deposited with the Clerk of Albany, according to the act of the 8th of January, 1794, it was held to be sufficient notice of the power, by means of the recital, to a subsequent purchaser who was equally affected by it, as if the power itself had been also deposited." It is true that in *Jackson vs. Bowen*, 6 *Cow.* 141, it is stated that the case of *Jackson vs. Neely* is virtually overruled, but not on a ground affecting the question here raised, the Court, in *Jackson vs. Bowen* holding, that the object of the deposit was to detect frauds and forgeries; whereas in the other case, the Court held the object was merely to give notice, which a record or registry would have done as well; and where such is the purpose it is not claimed that the decision in *Jackson vs. Neely* is incorrect.

In *Murray vs. Ballou*, 1 *John. Ch. R.* 566, it was held that "a purchaser of A, a trustee, is not chargeable with notice of the trust, by means of the registry of a deed from H to B, reciting that A had never executed a declaration of the trust." It will be observed that the deed containing the recital in that case, was not one in the regular chain of title from the trustee, and had it been, there is a strong intimation that the recital would have been good notice, the Chancellor remarking that "this deed containing this recital was registered on the 9th of April, 1810, but I cannot perceive any justice in obliging Ballou to take notice of the contents of that deed. By what clue was he to be directed to look into the deed from Heatly to Mrs. Green? He was dealing with Winter, and supposing Winter's trust to be, otherwise, totally unknown to him, he might as well be required to examine the contents of every deed on record. If there had been any deed on record to which Winter was a party, he would have had a specific object and guide for inquiry; *coeca reyens filo vestigia.*" This is hardly less than saying that a purchaser is bound by recitals contained in deeds constituting his chain of title.

In *Spence's Equitable Jurisdiction*, 756, the doctrine is laid down that "a purchaser—and, as before observed, a mortgagee is a purchaser *pro tanto*—who has actual notice of one instrument affecting the estates, has constructive notice of all

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other instruments to which an examination of the first could have led him, and if he do not examine into them, his conduct amounts to that degree of negligence which will charge him with all the consequences of notice. In all cases where a person cannot make out a title, but by a deed which leads to another fact, whether by description of the parties, recital, or otherwise, he will be deemed cognizant of it; for it was *crassa negligentia* that he sought not after it; and for the same reason, if a purchaser has notice of a deed, he is presumed to have notice of the whole contents of it." The relevancy of this doctrine to the case at bar will be apparent, when it is considered that it is admitted that Bennett had notice of the deed to Mary E. Goodrich, but denies notice of the contents of the same, or at least the recital of the mortgage to the Plaintiff in Error. To the same effect is *Adams' Equity*, 326; and in *Coote on Mortgages*, 377, it is also stated that if a party have notice of a deed, he has notice of all its contents. And in *Story's Equity Jur.*, *sec.* 400, it is stated that "an illustration of this doctrine of constructive notice is where the party has possession or knowledge of a deed under which he claims his title, and it recites another deed which shows a title in some other person, there the Court will presume him to have notice of the contents of the latter deed, and will not permit him to introduce evidence to disprove it. And, generally, it may be stated, as a rule on this subject, that when a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact. And see *Jackson vs. Hoffman*, 9 *Cow.* 271; *Dunham vs. Dey*, 15 *John.*, 555; 6 *B. Monroe*, 67; *Andrews vs. Wolcott*, 16 *Barb.* 21; 1 *Eden*, 351; 2 *Ves. J.* 457; *Sugden on Vendors and Pur.*, 1056; 2 *Hare*, 261.

The doctrine to be deduced from these authorities seems to be that whenever the instruments forming the purchaser's chain of title disclose an incumbrance, he is equally bound by such notice as by the record of the instrument itself, creating or evidencing the incumbrance, or actual notice of the same as in case of vendor's lien without mortgage. And the doctrine seems not only supported by the weight of authority, and consonant with sound reason and good sense, but a differ-

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ent one would be likely to lead to inequitable results. If this recital may be disregarded, as not being a material part of the deed, (as is claimed), how often would embarrassing questions arise as to the materiality of phrases of limitation or exception in deeds, either as to the effect of the terms used, or the manner and form in which they are introduced? In *Martin vs. Brown*, 4 *Minn.*, 382, it was held that the fact that a party gave only a quit claim deed, with a nominal consideration of one dollar, for valuable property, was a sufficient circumstance to put a purchaser on inquiry as to the vendor's title. The consideration and form of the deed were in that case deemed material parts thereof, and though it did not appear that the Defendant had actual notice of these facts, he was held concluded by the record. And we think the authorities use none too strong an expression in declaring it to be *crassa negligentia*, where a purchaser takes title without an examination of the title deeds relating to the estate. In the case at bar the deed disclosed the mortgage to all intents and purposes, as fully as the record of the instrument itself could have done, and showed that the mortgage was not due, and no presumption in favor of payment could be entertained. The exercise of even the most ordinary degree of prudence would have disclosed the lien of the Plaintiff in Error, to Bennett and his assignees. The Court has found that the assignees of Bennett had no actual notice of the existence of said mortgage to Daughaday, but relied upon an abstract of title to said premises, which did not exhibit the contents of said conveyances in the chain of title to said premises; but this fact does not raise any equities in favor of the respondent calling for the interposition of the Court in his behalf, not even had it further appeared that such is the usual custom of the country, in transfers of real estate. The gross carelessness which here prevails with reference to such transfers, has become proverbial, and is the fruitful source of litigation, and should be sanctioned by courts of justice no further than may be absolutely required by the true construction of statutes relating thereto. And instead of encouraging the practice of relying upon abstracts of title, made without reference to the contents of recorded instruments, (as the counsel seems to

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think desirable) it should be regarded with extreme disfavor.

Entertaining these views of the effect of the recital of the mortgage to Plaintiff in Error in the deed from Sarah E. to Mary E. Goodrich, it becomes unnecessary to examine the position of the counsel for Defendant in Error, with reference to the recording acts. If this recital be constructive notice of the mortgage, then Bennett and his assigns are not *bona fide* purchasers within the meaning of those acts, and consequently not protected by them, by virtue of a prior record. Those statutes do not purport, or attempt to define what constitutes notice, whether actual or constructive, but leave that question to be determined by the rules of law applicable to the case, independent of the statute.

The judgment below is reversed, and let judgment be entered in accordance with the prayer of the complaint.

ADELIA B. TRUE, Appellant, *vs.* CLINTON J. TRUE, Respondent.

APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY.

A decree for a divorce cannot be made upon the admission of the facts charged in the complaint: They must be substantiated by proof, and the proof must be that of witnesses other than the parties to the record.

Where a decree for divorce is assailed for fraud used in obtaining the same, and the fraud is clearly made out, the decree may be vacated.

Points and Authorities for Appellant.

I.—The decree and judgment were regular, authorized by law and in accordance with the rules and practice of the District Court for Washington county. *Comp. Stat. Minn.*, 463, 464; *see grounds of motion for judgment, folios* 21-2, *return*; *Stat. Minn.*, 543, *secs.* 88-9,—541, *sec.* 74; *Rule* 16 *of Law*,

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and 36 *of Equity Rules of District Court for Washington County, folios* 27-8, *return.*

II.—There was in fact no collusion between the parties to the action in respect to the action, its objects, or to the decree and judgment therein.

The *onus probandi* is upon him who asserts fraud. *Willard's Eq. Jur.*, 148.

a. It is doubtful whether the pretended affidavits of True, the Defendant, and of Sarah E. Demaray are really affidavits and were ever sworn to by either of them.

b. The affidavit of Defendant True contains the only proof of any corrupt agreement between the parties, and the effect and veracity of this affidavit are destroyed by the affidavits of Adelia B. True, the Plaintiff, of Charles S. Clark, Gold T. Curtis and John P. Houston.

The affidavit of Mr. Thompson is merely as to the acts of Clark, and not of the Plaintiff.

III.—The District Court has no power or authority to vacate a decree and judgment of divorce once granted and entered.

The decree of divorce was granted by a Court of competent authority, and fully and completely dissolved the marriage contract, and the Court has not the power to unite the parties again in matrimony, *nolens volens*, by a revocation of the decree.

Stat., 539, *sec.* 56; 463, *sec.* 5; 466, *sec.* 29, 30, 31, shows that it was contemplated that a decree of divorce should be final.

IV.—But if the Court has the power to interfere and vacate the judgment, it will not do so in this case. *Note* 2 *to sec.* 298, *Story's Eq. Jur.*, and cases there cited, between twenty and thirty in number.

V.—Material allegations in the complaint amply sufficient to sustain the decree for divorce, are not denied in the pretended affidavit of Defendant True, or any other of the affidavits.

In folio 5 and 6 the Defendant is charged with other acts of adultery besides those denied. *Folio* 42.

The allegations of the complaint (folio 10.) are not denied;

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of the absence of Defendant from his wife for most of the time since May, 1858, without any just cause. The charges in folio 11 and part of folio 12, that the Plaintiff has ceased to love or respect the Defendant, and entertains towards him only feelings of fear and aversion, (folio 18) &c., and that the Plaintiff and Defendant cannot live in peace and happiness together, and that their welfare requires a separation.

Points and Authorities of Respondent.

I.—The decree in this action was improvidently granted and not authorized by law.

II.—Courts of Record have control over all judgments or decrees made by them, and have authority to correct or vacate their judgments and decrees in all cases where a fraud has been perpetrated upon the Court. *Willard's Eq.*, 163; 6 *Wend.*, 537.

III.—The decree in this action and the judgment entered therein having been obtained by collusion between the parties, was properly vacated and set aside.

IV.—There having been some evidence produced to the Court below showing a collusion between the parties in obtaining the decree, and sufficient to satisfy the Court below, this Court will not consider the weight of evidence offered.

V.—It appears from the Appellant's own showing that the collusion charged existed in regard to one of the provisions of the decree, viz.: the custody of the child, which was as much a matter requiring the sound judgment and discretion of the Court, as any portion of the relief prayed for. See affidavit of Clark and Curtis.

Good morals and the welfare of society demand in cases of this nature that the charges in the complaint should be investigated and proved to the satisfaction of a Court.

Curtis & Houston, Counsel for Appellant.

L. E. Thompson, Counsel for Respondent.

By the Court—Flandrau, J.—This is an action for a di-

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vorce *a vinculo matrimonii*, brought by the wife against her husband, charging him with adultery, cruel and inhuman treatment, neglect, want of affection, and conduct rendering a dissolution of the marriage contract necessary to the peace and happiness of the wife. The Defendant put in an answer which raised no material issue, confessing the charges in effect. A motion was then made by the Plaintiff to strike out the answer and for judgment on the pleadings. The motion was granted by default, no one appearing to oppose it, and a decree entered upon the complaint as confessed, without any proof being taken of the facts charged, dissolving the marriage contract, and awarding the custody of the infant child of the parties to the wife.

The Defendant subsequently moved the Court to set aside the decree, and allow him to come in and answer, upon an affidavit of his own, denying the charges in the complaint, and alleging that one Clarke, a brother-in-law of the Plaintiff, had assumed the control of the Plaintiff, and had negotiated with the Defendant to allow the Plaintiff to procure a divorce, without the Defendant making any defence, and had offered him large sums of money to consent thereto; and had obtained from the attorneys of the Plaintiff the draft of an answer that raised no material issue to be put in, which answer had been actually made, &c. Also an affidavit of the woman with whom the adultery was specifically charged, denying the same; and the affidavit of L. E. Thompson, that Clarke, the brother-in-law of the Plaintiff, had deposited with a banker in Saint Paul, the certificate of deposite of another banker in Stillwater, where the parties resided, for the sum of fifteen hundred dollars, to be delivered to the Defendant when a decree of divorce, and awarding the possession of the child to the Plaintiff, was obtained, subject to the proviso that the Defendant should not interpose any other defence in the action than the answer that was then in, which was the insufficient answer before spoken of, and that the certificate was subsequently delivered to the Defendant.

The motion was opposed, and an affidavit of the Plaintiff was read, denying that she knew anything about the facts of collusion, &c., or ever authorized the said Clarke to make any

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agreement or deposit the certificate, as stated by Thompson. Clarke also swears that the agreement with the Defendant was concerning the custody of the child, and not touching the divorce, and he denies the alleged collusion touching the bad answer, and alleges that the Plaintiff was ignorant of his intervention in the matter.

One of the Plaintiff's attorneys denies positively any knowledge of, or participation in, furnishing the draft answer, and the other member of the firm denies it evasively.

Upon this state of facts the Court opened the decree, and from the order so made, the Plaintiff appeals.

The Plaintiff's counsel insists that a decree for a divorce may be taken upon a failure to answer, without proof of the facts alleged, as in any other case, and further, that a decree once made in such case is final, and can neither be appealed from, or disturbed on motion for any cause.

We will examine two points which seem prominently to be involved in this case, although the first one, as we view it, would be sufficient to decide the whole matter, leaving, as it does, the action of the Court in making the decree, without authority of law or jurisdiction. It is the granting the decree without proof. The second point will be whether a decree so granted, or obtained by collusion of the parties and fraud upon the Court, can be relieved against.

The contract of marriage differs from all other contracts in being indissoluble by the action of the parties to it, and of perpetually binding obligation until discharged by a competent court. It is the most important of the social relations. It is sanctioned by Divine authority, and recognized by all Christian nations as the palladium of virtue, morality, social order, and the permanent happiness of the human race. To its auspicious influence may be traced the great advances made in civilization, through the elevation of woman to social equality, the education of children, the refinement of manners, the improved sense of justice, the enlightened cultivation of the arts, and the physical development of man; and, above all, it is valuable as awakening in the human heart those chaste and exalted conceptions of virtue, which, in spiritualizing the mind, and subduing the grosser passions of

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men, give moral character and grandeur to the State. It is the only lawful relation for the continuance of the species and the perpetuity of the choicest benefits permitted by Providence to the enjoyment of man, and as such should engage the most profound solicitude of the legislator and the courts, to preserve it unsullied in its purity, and transmit it to posterity with its integrity unimpaired.

It is not pretended that by the mere consent of the parties the marriage contract may be dissolved, and it is for us to determine whether the same end may be attained by the mere form of a statement of the facts charged in a complaint by one of the parties, and the confession of them by the other, without any further proof. The power of granting divorces belonged formerly to the ecclesiastical courts, and was regulated by the canon law. The 105th canon, after reciting that matrimonial causes required the greatest caution when the marriage was sought to be dissolved upon any suggestion or petext whatever, concludes as follows: "We do strictly charge and enjoin, that in all proceedings to divorce and nullities of matrimony, good circumspection and advice be used; and that the truth, as far as is possible, be sifted out by the depositions of witnesses, and other lawful proofs and evictions; and that credit be not given to the sole confessions of the parties themselves, howsoever taken upon oath, either within or without the court." *Devenbagh vs. Devenbagh*, 5 *Paige, Ch. R.* 554. The State of New York has by statute made a provision to the same effect. 2 *N. Y. Rev. Stats.*, 144, *sec.* 35, and has also made full provisions by rules of Court, to carry it out. On the argument of this case we were impressed by the idea that our statutes contained a similar provision, and suggested it to the counsel; but on a full examination of the statutes and the rules of Court, we are unable to find anything on the subject. The idea which we entertained must have arisen from the almost universal prevalence of such a rule in practice, and the necessity of it to prevent fraud and collusion in the procurement of divorces. My own practice, when acting as District Judge, was always to require proof of all the material facts, and by witnesses other than the parties themselves. This Court is of the same opinion, notwithstanding the apparent silence of the statute.

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It is insisted that no distinction is made in divorce cases in this respect by the statutes of this State, and that they stand governed by the same rules as other actions. We have pointed out the radical difference between the marriage contract and other civil contracts, which we think is alone sufficient to authorize the Court to adopt the principles of the canon law concerning its dissolution. It matters not to society at large whether A or B owns any particular estate in lands or other property, and the law therefore imposes no restrictions upon them in confessing away or surrendering their rights in such matters; but the community and the State have the most vital interest in the sanctity of the marriage compact, and have confided its keeping to the courts of justice alone, and limited the causes for which it can be broken to such as are deemed, in the wisdom of our rulers, incompatible with its continuance and the well being of the parties and society.

Previous to the year 1855, a divorce could only be granted for six causes—adultery, impotency, imprisonment in the Penitentiary of either party, wilful desertion for one year, cruel and inhuman treatment, and habitual drunkenness for a year. In 1855, to meet a particular case, the legislature (as we think subsequent events have fairly proven) improvidently added the following clause to the law: "When it shall be made fully to appear that from any other reason or causes existing, the parties cannot live in peace and happiness together, and that their welfare requires a separation." *Comp. Stats.*, 463, *sec.* 7.

It is not for us to criticise, but to expound and apply. This section has been gravely quoted in other cases as showing the intention of the legislature to be the encouragement of divorces by affording unusual facilities for their attainment; but while we concede that it allows the Courts a wide field for the exercise of discretion in determining such causes, we do not think it in any manner relaxes the rules by which such applications should be scrutinized, and such relief administered.

We think upon an examination of the whole statute concerning the subject of divorces, it is fairly inferable that the decree cannot be made upon the admission of the facts

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charged in the complaint. It differs from the ordinary civil action to redress private wrongs or enforce private rights, in many essential particulars. It requires a longer notice to appear and answer, with a discretion in the Court to order a still longer time in proper cases. It allows the answer in all cases to be without oath, the evident design of which is, that the Defendant shall not be compelled to aid by his confessions the establishment of the charges against him, but that the Plaintiff shall make them good by other proof. It is only necessary to state in the complaint the names and ages of the parties, the name of the Court in which the action is brought, and the facts constituting the cause or grounds of the complaint, and the Court may, on the hearing of the action, not only pronounce sentence of divorce, but determine which of the parents shall have the custody of the children, restore the wife to her real estate, and regulate the enjoyment by her of her personal estate, award alimony to the wife from the estate of the husband, and change the name of the wife. These matters may all be examined into on the hearing without allegations concerning them in the complaint, showing conclusively that the whole statute contemplated the intervention of the Court upon proof. But even without these indications from the statute, we would feel bound from the nature of the contract sought to be avoided, to hold that the facts must be substantiated by proof, and that the proof must be that of witnesses other than the parties to the record. *Bishop on Marriage and Divorce, secs.* 299 *to* 307, *inclusive.*

As the decree was granted in this case without any proof at all, it is clearly without authority of law, and erroneous.

The next and more difficult question is, whether a decree of divorce once granted by a Court of competent jurisdiction, can be for any reason disturbed? We have no hesitation in holding, that when such a decree is assailed for fraud, and the fraud clearly made out, it may be vacated. For instance, suppose the Defendant had never been served with the process of the Court at all, but the proof of service, whether by return of the Sheriff or affidavit of a private party, was totally false, would it be any answer to a husband or a wife to say that your remedy is against the Sheriff for a false re-

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turn?—that the decree is final, your marriage bonds are severed, and the Court cannot reunite you by annulling the decree? I would be very reluctant to concede such incapacity in the courts of equity. It would be robbing them of a large share of the comprehensive and penetrating jurisdiction which they have so beneficially exercised over the affairs of men, by detecting and preventing the most artfully designed schemes of fraud, and punishing the perpetrators; and by protecting the weak against the aggressions of the powerful. Nor do I see anything in the peculiar nature of the decree that should make it in an ordinary case more conclusive than the other judgments and decrees of the courts. We are told that the parties may marry again, and that the consequences would be disastrous to the inheritance of estates and the legitimacy of offspring. Yet it is the constant practice of the Courts to refuse to recognize as binding the decrees of Courts of other States dissolving marriage contracts when they are irregularly granted, letting the consequences of subsequent marriages take care of themselves. See *Jackson vs. Jackson*, 1 *John. R.*, 424; *Pawling vs. Bird, Ex'rs*, 13 *John. R.*, 192; *Borden vs. Fitch*, 15 *id.*, 121, and the numerous cases cited therein. Would it not be infinitely more to be regretted that the rights of innocent parties should be destroyed, and they perhaps branded with the infamy of being adjudged adulterers, and stripped of their estates by the conclusiveness of a decree obtained by fraud, than that the shame or misfortune should fall upon parties and their children, who, with indecent haste, or censurable indiscretion, have formed matrimonial alliances without first satisfying themselves on such vital considerations. It is not to be denied that the most circumspect may be led into such difficulties. Yet when a misfortune is incurred, and must be borne by some one, it is but justice that it should not fall upon those who are free from all blame, and whose legal rights are fixed and certain. We think the Court had the power to set aside this decree on a case of fraud or collusion being made out in the procurement of it.

We had no doubt on the argument of the case that improper appliances were used by Clarke to induce the Defend-

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ant to suffer a default, and a full examination of the papers strengthens the view we then entertained. The furnishing the Defendant with a draft of an answer that raised no issue, is not satisfactorily cleared up, and the payment to him of fifteen hundred dollars by Clarke through the medium of the certificate of deposit left with the banker in St. Paul, is admitted. The attempt of Clarke to show that it had relation only to the Defendant not interposing any claim to the custody of the child, is in direct conflict with the written conditions that Clarke made concerning its delivery to the Defendant when he left it with the banker, which were that it was to be "delivered over to Defendant when a decree of divorce and awarding the possession of the child to Plaintiff was made by the Court, subject to a proviso that the Defendant should not interpose any other defence in the action than the answer already served," which was the imperfect answer, the draft of which had been previously furnished him. Supposing the explanation of Clarke to be true, that it was paid only to prevent the Defendant from making claim to the child, it is difficult to see how that made it any the less a fraud upon the Court. One of the most important considerations in such cases, is, which parent shall have the care and custody of the infant children; and the public has even a deeper interest in the decision of that question, than in the matter of the divorce. The training and culture of the youth of a State may exert a much more potential influence upon its future posperity and character for good or evil, than the separation of a man and his wife whose habits are formed, and whose social status is determined. This delicate trust is the special province of a court of equity and cannot be taken from it by the collusion of the parties.

As to the agency of Clarke for the Plaintiff, we have only to say that he appears in the record to have come to the place of her residence in the relation of her protector against the aggressions and misconduct of her husband. That he has assumed the active management and control of her person, and her suit. That she has evidently recognized him as so acting all along, and if in his zeal in her behalf he has overstepped the bounds of propriety, and the Court below has been imposed

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upon by his acts, she cannot be permitted to derive a benefit therefrom by a mere denial of any knowledge on her part of the particular act. She is bound by its effect.

We cannot allow this case to pass without regretting that it became necessary to establish the rule we have here laid down under the circumstances presented by this record. The conduct of the Defendant has been throughout criminally censurable, and nothing but the most imperative sense of duty in asserting the correct practice in the beginning, has influenced us in sustaining his motion to open the decree.

Order affirmed.

D. DEVLIN and others, Appellants, *vs.* A. T. CHAMBLIN, *et als.*, Respondents.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

The taking the note or security of a person, other than the debtor, is not *prima facie* evidence that the same was taken in payment of a *precedent* debt. There must be evidence of an express agreement to take such note in payment, in order to give it that effect, and the burden of proof is upon the debtor to show such agreement. But the rule seems to be different where a commercial instrument is given in payment of a contemporaneous sale, and the vendee is not liable on the instrument. In such case the presumption of law is that the vendee is not liable on the original indebtedness; but the acceptance by the vendor of goods, at the time of the sale, of a draft drawn by the vendee upon a stranger, and accepted by him, is not *prima facie* evidence that the same was taken as absolute payment of the purchase money. The question is one of fact for the jury to determine.

This action was brought by the Plaintiffs to recover the balance of $271.04-100, for goods, wares and merchandize sold and delivered.

The complaint alleges that the Defendants are and were, at the time therein stated, a partnership association of persons existing and doing business under the name of the "Minnesota Pioneer Guard."

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That on or about the 8th day of February, 1859, the Plaintiffs sold to the Defendants, goods, wares and merchandize of the value and at the agreed price of $1771.04-100, and alleges that the Defendants have paid on the same the sum of $1500, and have refused to pay the balance.

The Defendants by their answer, each and every of them, deny that they were at any time members of a co-partnership, or engaged in any co-partnership business, or that they composed or were an association of persons existing or doing business under the name of the Minnesota Pioneer Guard, or any other name, as alleged in the complaint or otherwise.

They admit that they were members of a certain military company, composing a part of the Volunteer Militia of the State of Minnesota, known as the "Minnesota Pioneer Guard," and avers that no other relation, of any kind whatever, existed between them.

The answer then denies the sale and delivery of the goods, wares and merchandize mentioned in the complaint, to the Defendants, or any of them, and denies any promise or liability of the Defendants to pay for the same; and denies that they, or any of them have ever paid $1500, or any other sum, for or on account of such goods.

The answer avers that the goods sold by the Plaintiffs, and referred to in the complaint, consisted of certain military uniforms that were furnished by them for the individuals composing said military company, known as the Minnesota Pioneer Guard, and that the Plaintiffs sold all of said goods, wares and merchandize mentioned in the complaint, for and in consideration of two certain acceptances of the banking house and firm of Caldwell & Co., then doing business in the city of Saint Paul. The first acceptance being for the sum of $1500, and the second for the sum of $271.04-100, which acceptances the Plaintiffs took and received in full payment and satisfaction for said goods.

The Plaintiffs in their reply deny that the two acceptances of Caldwell & Co. were received by them in payment, but allege that the acceptances were given to and received by the Plaintiffs as collateral security for the payment of the price of the goods.

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The evidence on the part of the Plaintiffs consisted of the deposition of Jonathan Ogden, one of the Plaintiffs, and by which it appears that on the 8th of February, 1859, the Plaintiffs sold the uniforms for the Pioneer Guard to Captain H. H. Western, amounting to $1289.04.

That on the 19th of February, 1859, they sold Captain Western the military overcoats for the company, amounting to $482, making an aggregate bill of $1771.04-100.

That previous to the delivery of the goods, and on the 19th of January, 1859, Captain Western gave the Plaintiffs his drafts, accepted by Caldwell & Co., January 4th, payable seven months from dates of acceptance, for $1500.

That afterwards, on the 10th of March, Captain Western gave the Plaintiffs his second draft, accepted by Caldwell & Co., on the 19th of February, payable six months from the date of the acceptance, for $271.04, that being the balance due upon the whole purchase.

This witness testifies in his deposition that the whole contract of sale was made with Captain Western, at the Plaintiffs' store in New York, and the goods sent as ordered by Captain Western, and to his address; and that none of the other Defendants were present at the time of the purchase.

This witness also testifies that the drafts accepted by Caldwell & Co., were not received in payment for the goods, but were received by the Plaintiffs as collateral security, to secure the payment for the goods.

But in answer to the third cross interrogatory the witness produces a transcript from the Plaintiffs' ledger of the entries of these accepted drafts, by way of credits at the time they were received.

The credit entry upon the ledger is in the following words:

"Jany. 19. . 'Cr.' By H. H. Western's (Capt. Minnesota
" Pioneer Guard) draft on Caldwell & Co., and
" accepted by them January 4th, at 7 mos., due
" Aug. 7, on ac. $1500.00."

Points and Authorities of Appellants.

I.—The Court was right in refusing to charge as Defendant

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requested, that the delivery of the draft was presumptive evidence of payment.

By presumptive evidence of payment is of course meant a fact which in the absence of other evidence would be conclusive evidence of the payment, or in other words, would be payment.

Such is not the law—the presumption is the other way. *Tobey vs. Barber*, 5 *Johns.*, 68-72; *James vs. Hackley*, 16 *Johns.*, 273; *Alcock and others vs. Hopkins*, 6 *Cush.*, 485; *Lyman vs. U. S. Bank*, 12 *How.*, 225.

II.—The Court did not err in holding or charging that the delivery to and acceptance by the Plaintiffs of the draft was no evidence of payment, and that the *onus* was on the Defendants to prove affirmatively by other evidence that the Plaintiffs received it as payment. 1 *Greenleaf on Ev.*, *sec.* 33; *see also on Presumptions*, *sec.* 14. Presumptions of fact, on the contrary, are those where the conclusions to be drawn from the facts proved are left to the judge or jury trying the case. *Sec.* 44; and from which the law draws no conclusion.

Now we find, on looking at the law of this case, that from the mere fact of the delivery to and acceptance by the Plaintiffs of the draft, and in the absence of any other evidence, the law presumes that it was only conditional payment. In other words, that fact alone is *prima facie* evidence that it was taken as conditional payment. *See cases cited under point first.* The law even goes further than that, and says that if at the time of taking the draft or note, a receipt is given speaking of the "transaction as payment, or even payment in full, it will be interpreted as conditional payment to be in full when paid." 24 *American Lead. Cases*, 246, *and cases cited.*

III.—The Defendants then claim there was error in the charge of the Court and put it upon a different ground from that on which the Court below granted a new trial.

They first claim that the giving a negotiable note, in consideration of a simple contract debt, is of itself a discharge of the debt, or at least *prima facie* evidence of the same, and cite several Massachusetts cases, that of 2*d Metcalf*, 173, referring to all the others. But in this view of the law, Massachusetts, and some other New England States, stand alone;

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and the course of decision of late in those States is tending the other way. *See* 2 *Amer. Lead. Cases*, *p.* 250. The great weight of authority is the other way. 2 *Amer. L. C.* 243, *and cases cited.*

The respondents think that the Court "overlooked the well settled distinction between a purchaser giving his own note for the price of goods purchased and the note or accepted bill of the third persons; while in New York the former is held as no evidence of payment, the latter is everywhere regarded as a *prima facie* evidence of payment." The respondents have misapprehended the distinction. It really is this: It is everywhere admitted (except in parts of New England) that taking the note either of the party himself or a third person, for a precedent debt, is not *prima facie* evidence of payment, but on the contrary it is *prima facie* presumed to be conditional payment merely. 2 *Amer. L. C.*, 246, *and cases cited.*

While the earlier New York cases held that in case of the giving of the note of the debtor only, it was conclusively presumed to be conditional only, and that it could not be considered payment. 2 *Amer. L. C.*, 248; *Cole vs. Sackett*, 1 *Hill*, 516; *Waydell vs. Tuer*, 5 *Hill*, 448. And that continued to be the law of New York till the last named case was reversed in the Court of Errors. 3 *Denio*, 510. So that in regard to precedent debts the law would seem to be clear that the taking of a note even of a third party is *prima facie* conditional payment only, and not absolute unless such is proved to be "the clear and undoubted intention of the parties."

IV.—Another point raised by the respondents is that there is a distinction between giving a note for a precedent debt and giving it for the price upon the purchase of the property, and claims that this draft was given at the time of the purchase.

a. The fact, however, is otherwise, and the draft was not given till after the purchase and after the Defendants had become liable to pay for the goods.

b. The most that Defendants could claim was, that it was a question for the jury on the evidence to say whether the draft was delivered at the time of the sale, and to request the Court to charge that if they so found the fact, the presumption would

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then arise that it was payment. But by their request they make it incumbent upon the Court to decide that the draft was taken at the time, instead of "furnished afterwards."

c. But even were the draft taken at the time, the charge would be correct.

While we admit that the giving a note of a third party at the time of a purchase is *prima facie* evidence of an agreement that the note should be payment, yet it is undoubted that this effect of its operating as payment cannot be ascribed to it as matter of law, and apart from the agreement of the parties. 2 *Amer. L. C.*, 263, *and cases cited; Olcott vs. Rathbone*, 5 *Wend.*, 491; *Frisbie vs. Learned*, 21 *Wend.*, 451-2; 2 *Amer. L. C.*, 247; *Whitbeck vs. Van Ness*, 11 *Johns.*, 411; *Noel vs. Murray*, 3 *Kernan*, 168; *Monroe vs. Hoff*, 5 *Denio*, 360; *Butler vs. Haight*, 8 *Wend.*, 535; *Alcock vs. Hopkins*, 6 *Cushing*, 490; *Gerrano vs. Wilson*, 8 *Cushing*, 424.

V.—On general principles there is no reason why such a draft should be any evidence of payment. The liability of the Defendants is precisely the same on the original consideration, or on the draft. In either action the draft must be produced, and in either action the Defendant can get up any defence he may have. In the case at bar, the Defendants have drawn the draft and are liable on it, as testified to by their own witness, Capt. Western. It is difficult to imagine how the Defendants could suppose that they escaped liability when they made such a draft, or at least of all, how they could suppose or intend that the Plaintiff should so understand the contract, but the presumption is most natural that it was given and received as additional or collateral security.

Much is said by Defendants about the exhibits in the case as showing that the Plaintiff received the draft as payment; but the fact is that the exhibit merely shows that the draft was credited as a "full settlement," not payment, or in other words full liquidation, for the purpose of balancing books.

And again the question on that evidence was for the jury, the Defendants by their request and exception raising the simple question whether the taking of the draft by itself and aside from any exhibits, was *prima facie* evidence of payment.

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We have already seen that it was not; first, because not taken at the time of the sale, and second, because the Defendants being liable thereon it was *prima facie* taken at the risk of the vendee.

Points and Authorities for Respondent.

I.—The Court below erred upon the trial in overruling the motion made by the Defendants' counsel, and refusing to dismiss the action after the Plaintiffs had closed their evidence and rested.

1. Because the partnership and business association of the Defendants was denied, and in issue, by the pleadings, and no evidence was given upon the trial tending to prove such allegation in the complaint, and without which the Plaintiffs could not recover.

2. Because there was no evidence tending to prove that Capt. Western had any authority from the Defendants to purchase the goods in question, or to contract any legal liability to bind the Defendants.

The fact that the Defendants were members of a volunteer militia company gave them no legal power to contract or to be contracted with as such, and the fact that Capt. Western happened to be the captain of that military company, conferred no authority upon him to contract liabilities on behalf of the company, for clothing or anything else, and the evidence showed that the sale and delivery of the goods was made to Capt. Western, and not to the Defendants.

II.—The first instruction which the Defendants' counsel requested the Court to give to the jury, was correct in law, and the Court erred in refusing the same, viz.:

"That the delivery to and acceptance by the Plaintiffs of the negotiable accepted draft, due at a future time, was, in the absence of any other testimony, presumptive evidence of payment."

III.—The second instruction which the Defendants' counsel requested the Court to give to the jury was also correct, and the Court erred in refusing to give the same as requested, that is,

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"That the *onus* of proof was upon the Plaintiffs to show that the accepted draft, so received by them, was not received in payment."

IV.—The Court erred in instructing the jury on the contrary, "That the delivery to and acceptance by the Plaintiffs of the draft accepted by Caldwell & Co., was no evidence of payment, and that the *onus* of proof rested upon the Defendants to prove affirmatively by other evidence that the Plaintiffs received it as payment.

These rulings and instructions were all against the Defendants and were clearly erroneous.

In Massachusetts the Supreme Court hold, that a negotiable note given in consideration of a simple contract debt, is a discharge of the contract. 5 *Mass., p.* 301, *Thacher vs. Dinsmore*; 6 *Mass., p.* 145, *Maneely vs. McGee, et al.*; 12 *Pick., p.* 268, *Wood vs. Badwell et al.*; 2 *Metcalf, p.* 173, *Ilsley vs. Jewett*; *Edwards on Bills and Notes, p.* 195; 5 *Wend., p.* 490, *Olcott vs. Rathbone*; 21 *Wend., p.* 45 *and* 452; *Trishe vs. Larned*; 11 *Johns., p.* 409, *Whitlock vs. Van Ness*; 8 *Cow., p.* 78, *Hughes vs. Wheeler*; 3 *Wend., p.* 67, *Booth vs. Smith*; 2 *Am. Leading Cases, p.* 185-86; 2 *Greenleaf's Ev., p.* 511, 513, *sections* 519, 523, *and cases there cited.*

In these instructions to the jury the Court evidently overlooked the well settled distinction between a purchaser's giving his own promissory note for the price of goods purchased, and his giving the note or accepted bill of third persons.

While, in New York the former is held to be no evidence of payment, the latter, the giving of the negotiable note or bill of third persons for the price of property purchased, is everywhere held to be *prima facie* evidence of payment, and that it was received as payment, thereby placing the *onus* of proof upon the party receiving it to show that it was not received as payment, or intended by the parties so to operate. The distinction is also clearly preserved in all the cases between the giving of a note or bill to settle an antecedent debt already contracted, and the giving of a note or bill for the price upon the purchase of property.

In the former case the liability or debt of the debtor has already accrued and become fixed, and therefore does not depend upon the terms of a new contract.

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But in the latter case the delivery of the note or bill for the price of the property purchased, and its receipt by the vendor, is presumptively a part of the terms of the contract of the purchase, and the Courts so regard it; and say that the legal intendment is, that it was received as payment, yet this presumption is liable to be rebutted by other proof from the party receiving it, that it was not received as payment, but as collateral.

All the cases agree that the payment or delivery by the vendee to the vendor of the negotiable note or bill of third persons has the same effect and is like the payment of any other chattels of value; the law presumes that it was the mode of payment agreed upon, and that it was given and received as such.

The negotiable acceptance of reputed solvent bankers has an intrinsic commercial value in the hands of the holder; it readily circulates in the commercial world by its delivery; the drawer has parted with its equivated value at the time, and placed it beyond his control; the holder has obtained the legal liability of the acceptors in a negotiable form, which may be readily transferred from hand to hand by delivery. Its payment does not depend upon the will of the drawer; the holder has the liability of the acceptors, and it is beyond the control of the drawer.

The delivery of the bill to the vendee might or might not be a payment in fact depending upon the intention and agreement of the parties at the time it was received. But it was *prima facie* payment; the legal intendment is that it was received in payment; and the *onus* is with the holder to rebut this presumption.

Therefore the Court clearly erred in instructing the jury in this case, "that the delivery to and acceptance by the Plaintiffs of the draft accepted by Caldwell & Co., was no evidence of payment, and the onus of proof rested upon the Defendants to prove affirmatively by other evidence that the Plaintiffs received it as payment."

And the material prejudice to the Defendants of this instruction is apparent from a glance at the evidence.

The witness Ogden, whose deposition was read on the part of the Plaintiffs, testified that the accepted draft was not re-

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ceived in payment but as collateral security; while the witness, Capt. Western, on the part of the Defendants, testified that the draft was delivered to and received by the Plaintiffs in payment and not as security.

There were no other witnesses to this point, therefore the evidence given upon the trial by the witnesses was equally balanced, and the instruction of the Court turned the balance in favor of the Plaintiffs, and left the jury no alternative but to find a verdict for the Plaintiffs.

The Court below became satisfied that these instructions were clearly erroneous, and granted a new trial.

ALLIS & PECKHAM, Counsel for Appellants.

SANBORN & LUND, and M. E. AMES, Counsel for Respond'ts.

By the Court—ATWATER, J.—This was an action brought by Plaintiffs below (here Appellants,) to recover a balance due for goods and merchandise sold the Defendants, amounting to $271.04. The Defendants pleaded payment by an accepted draft on Caldwell & Co. of St. Paul. The Plaintiffs replied that the same was taken only as collateral security, and not as payment. This was the principal issue raised, and the only one which it is deemed material to notice.

There was a jury trial, and a verdict for the Plaintiffs. The Defendants move for a new trial on a case, which motion was granted, and from that order the Plaintiffs appeal.

The Defendants, among other things, requested the Court to charge the jury that the *onus* of proof was upon the Plaintiffs to show that the accepted draft so received by them was not received in payment. The Judge refused so to charge, and on the contrary then instructed and charged the jury that the delivery to and acceptance by the Plaintiffs of the draft accepted by Caldwell & Co. was no evidence of payment, and that the *onus* of proof rested upon the Defendants to prove affirmatively, by other evidence, that the Plaintiffs received it as payment. The Judge who tried the cause thinks the case as settled shows an error in fact, and that the instruction to the jury was not as above stated. But that as he can-

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not be positive, he grants a new trial, as if the charge was, as above stated, it was in his opinion erroneous.

The question has been very much discussed as to what constitutes presumptive evidence of payment in this and analogous cases, and the whole question is very fully examined in 2*d Am. Leading Cases*, *p.* 170, *et seq.* It will be seen that the authorities are somewhat at variance, but without entering upon any discussion of the question here, I think the weight of authority is to the effect that the taking the note or security of a person other than the debtor, is not *prima facie* evidence that the same was taken in payment of a *precedent* debt. There must be evidence of an express agreement to take such note in payment, in order to give it that effect, and the burden of proof is upon the debtor to show such agreement.

But the rule seems to be different where a commercial instrument is given in payment of a contemporaneous sale, and the vendee is not liable on the instrument. In such case the presumption of law is that the vendee is not liable on the original indebtedness. In the case at bar, the vendees have made themselves parties to the instrument given to the vendor, the draft on Caldwell & Co. having been drawn by Capt. Western, President of the Pioneer Guards, and in his evidence he swears that he had authority to draw the drafts as Captain of the company. I have examined the authorities with care to ascertain whether in such case there is any legal presumption that the instrument was taken in payment, and although there is some uncertainty in the language used in some of the cases, I think the weight of authority is clearly against such presumption.

The case of *Whitbeck vs. Van Ness*, 11 *John.*, 409, is cited by Respondents' counsel, and is a leading one in this class of cases. By reference to that case it will be seen that the vendee not only was not a party to the note given in payment for the horse, but the evidence showed that he did not intend to render himself liable on the note or in any other manner. Spencer, J., in reviewing the English authorities cited in that case, refers to the *Bank of England vs. Newman*, 1 *Lord Raymond*, 442, *and* 12 *Madison*, 241, in which Lord Holt

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ruled, "that if a man has a bill payable to him, or bearer, and he delivers it over for money received, without endorsement, this is a plain sale of the bill; and he who sells it does not become a new security; otherwise, if he had endorsed it." In *Fydell vs. Clark*, 1 *Esp. Cases*, 448, it was held, that "if a man in the discount of notes, takes bills without endorsement, he must be considered as having taken the risk of payment on himself; that by not endorsing them, the Defendant refused to pledge their credit." And in *Emly vs. Lye*, 15 *East.*, 12, it was held that "if a person buy goods of another, who agrees to receive a certain bill in payment, the buyer's name not being upon it, and that bill be afterwards dishonored, the person who took it cannot recover the price of his goods from the buyer, for the bill is considered as a satisfaction." And the Justice further remarks in the case of *Whitbeck vs. Van Ness*, that "the intrinsic circumstances of the case plainly show that the Plaintiff considered himself, as taking Deane's note at his own risk. It was made payable to the Plaintiff himself, and the Defendant, by not endorsing it, or guaranteeing the payment, clearly declined pledging his own responsibility." From all which I think it is manifest that the Court not only did not decide that where the debtor's name is on the instrument, he cannot be held for the original consideration, but the inference is strongly to the contrary.

In *Olcott vs. Rathbone*, 5 *Wend.*, 490, it is claimed that the Court decided that "the general principle is that a bill or note is no satisfaction of any demand for which it has been given; it is only *prima facie* evidence of payment." This language it is true appears in the opinion of the Court in that case as a quotation from some author, (*Bayley on Bills* I think,) but neither from the syllabus nor the opinion does any such point appear to be decided in that case, but that where a creditor had received the check of a third person in payment of a precedent debt, which check was dishonored, the creditor might recover on the original consideration.

The case which most strongly supports the view taken by the counsel for the respondents, is that of *Frisbie vs. Larned*, 21 *Wend.*, 450, in which it is stated in the syllabus, that "the acceptance of the note of a third person from one of the mem-

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bers of a firm, endorsed by him, together with the payment of the balance of the account against the firm in cash, is an accord and satisfaction of the demand against the firm; there being no agreement that such note was received merely as collateral security." In that case the note of the third party was endorsed by *one* of the members of the firm only, so that it presents a somewhat different state of facts from the case at bar. But the Court say that "where the note of a third person is transferred by the debtor to and taken by the creditor, and credit is given for it as a payment, the effect is the same as the acceptance of a horse, or other chattel on the same terms. The simple contract of sale or claim on one side, and a promise to pay by the vendee or debtor, is departed from; a new and distinct contract is made and new relations arise out of it. True the security may still be collateral, but independent of proof affirmative that it is so, I think the intendment should be that the security was received in satisfaction." But that these remarks are mere *dicta*, not necessarily called for in the decision, is manifest from the very next sentence, in which the Court says that "it is not necessary, however, to go so far in this case; for here is express proof that the note was intended to operate as a satisfaction; there was an endorsement credited as in full, and afterwards extinguished by a bond and judgment." And further, "above all, the evidence is quite too strong for the presiding judge to say, as he did virtually in this case, that there was not evidence even to go to the jury." And those of the authorities cited in that case, (to which I have had access,) to show that the transfer of the note operated as payment, clearly do not hold that the giving of a draft, drawn by the debtor himself, is presumptive evidence of payment for goods purchased, so that the vendor must rebut the presumption in order to recover on the original consideration.

Edwards on Bills, p. 195, states that "when a vendor, on a sale and delivery of goods, receives from the vendee the note of a third person for the price, the presumption is, that he takes it in payment; especially is this so where he gives a receipt for the note in full for his bill." But he also states on the following page, that "any act, such as indorsing or guar-

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anteeing the note which shows that the purchase was not made on the faith of the note delivered, will rebut the presumption of payment." It would seem that the drawing of a draft should be regarded at least as strong evidence to rebut the presumption that the same was taken in payment, as an endorsement.

In *Booth vs. Smith*, 3 *Wend.*, 66, it was held "that the acceptance in full satisfaction by a creditor, of a note of a third person for the whole amount due on a previous note given by his debtor, is an extinguishment of the original consideration." The difference between that case and the present, is apparent without comment. And in *Noel vs. Murray*, 3 *Ker.*, 168, a note of a third person was given on sale of goods, on which the vendee's name did not appear, and a receipt in full was given for the goods sold. And in *St. Johns vs. Purdy*, 1 *Sand.*, 9, the note of a third person given by the debtor, was held as payment, on the ground that there was explicit evidence to show that the creditor had so agreed to receive it.

In none of the cases cited, therefore, (save those from Massachusetts Reports) do I think the doctrine can fairly be deduced, that the acceptance of a draft by the vendor of goods at the time of sale, drawn by the vendee upon a stranger and accepted by him, is to be deemed *prima facie* evidence that the same was taken in absolute payment of the purchase money. On the contrary, there are several authorities where the opposite doctrine is held, and I think supported by the better reason. In *Johnson vs. Weed*, 9 *John.*, 310, where the vendor of goods took the note of a third person in payment and gave a receipt in full for the debt, but remarked that it should have been endorsed by the vendee, to which the latter replied that it made no difference, the Court held that it was a question of fact for the jury to determine at whose risk the note was to be. And in 2 *Amer. L. C.*, 187, after discussing the effect of taking bank bills as payment, it is stated that there is much less reason for supposing that payment for a contemporaneous sale in the bills or notes of an individual is absolute, than where it is made in bank notes; and it would seem that this effect cannot be ascribed to it as a matter of law, and apart from the agreement of parties. The

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cases fully establish that in the absence of such an agreement, the vendor may sue for goods sold and delivered, when the name of the vendee is on the instrument, and it is dishonored by the party primarily liable for its payment; citing *Hickling vs. Hardy*, 7 *Taunton*, 313; *Brower vs. Keewly*, 2 *Bos. & Pul.*, 318; *Wright vs. The First Crockery Ware Co.*, 1 *N. H.*, 281; *Jones vs. Savage*, 6 *Wen.*, 658. And in *Monroe vs. Hoff*, 5 *Denio*, 369, the guaranty of the purchaser was held to rebut a presumption which otherwise would have arisen, that the note guaranteed had been taken as absolute payment of the purchase money. In such cases the debt is suspended, not satisfied; and the only difference between them and those in which the paper given in payment does not bear the name of the vendee, is that the absence of the right of recourse on the instrument may justify an inference that it was not intended to arise on the consideration. But the whole question would appear to be one of fact for the determination of the jury, rather than of law for the Court; and as the ordinary understanding in contracts of sale is, that the vendor shall, in some way or other, get his money, the burden of proof ought to lie on those who seek to show that he agreed to be satisfied with something less. 10 *Vesey*, 204; *Exparte Blackburne; and Ward vs. Evans*, 2 *Ld. Raymond*, 928.

A further argument in support of this doctrine is derived from the construction which is put on an agreement to take commercial securities in payment for a contemporaneous sale, in cases where the securities are not delivered. In such circumstances it is well settled that *indebitatus assumpsit* will lie for the purchase money, at the period when the bill would have reached maturity had it been delivered. It is difficult to see on what principle this is allowed in such cases, and not permitted where the bill has been delivered. The presumption is as strong in the one case as in the other, that it was the intention to take the bill in payment.

From the foregoing authorities it will be seen that, upon a contemporaneous sale of goods, where the vendor receives commercial paper upon which the vendee's name appears in form that may render him liable, the law raises no presumption that the same was received in payment, but the question

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is solely one of fact for the determination of the jury. In such cases the presumption is at least equally as strong that the paper was only intended as collateral security as that it was taken in absolute payment. And if this be true there was no error in the charge of the judge to the jury. When the Court charged that the acceptance of the drafts by the Plaintiffs was no evidence of payment, he must have meant, and the jury must have understood him to mean, that from that fact no legal presumption could be drawn that the draft was received in payment—that it was not *prima facie* evidence of payment. The Court was instructing the jury solely as to the law of the case; with the facts the Court had nothing to do. In my opinion the Court might have even gone farther than it did, and held that the delivery of a receipted bill for the goods would have formed no legal presumption of payment. But limited as the charge was to the simple question of whether the acceptance of the draft by the Plaintiffs formed any evidence that the same was taken in payment, we do not think that the learned judge mis-stated the law, nor that the jury could have been misled by the language used. Almost the sole issue formed by the pleadings is as to whether this draft was received in full payment, or only as collateral security. This was the question submitted to the jury, and it is scarcely possible to conceive that they did not understand that they were to consider every fact bearing upon this issue, and that the language of the judge meant only that the law raised no presumption that the draft was received in payment, from the naked fact of its delivery. Although it may be true that the jury could not have found that there was payment by draft, unless the same had been delivered, yet it does not follow that the delivery in law constituted any evidence one way or another, as to how the same was received by Plaintiffs.

We have treated this subject as though the draft was given on a contemporaneous sale of goods, though as a matter of fact it is claimed by the appellants that it was given for a precedent debt, and that question would perhaps be a proper one for the determination of the jury. But the charge would be still less open to objection if the draft were given for a pre-

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cedent debt, and the respondents at least cannot complain that this view has been adopted.

The order granting a new trial is reversed, and judgment ordered in favor of the Plaintiffs.

J. G. SENCERBOX, Plaintiff in Error, *vs.* FRANK MCGRADE, Defendant in Error.

ERROR TO THE DISTRICT COURT OF SCOTT COUNTY.

When an agent or attorney contracts on behalf of his principal, he must do so in the name of the principal, or the latter is not bound. When any one has authority to do an act, it should be done in the name of him who gives the authority; not in the name of the agent or attorney.

Although a mere receipt acknowledging payment of money may be varied or contradicted by parol, yet where it contains an agreement, condition or stipulation between the parties, it is in the nature of a contract, and is not liable to be varied by parol. So where a bill of sale named the vendee as J. W. S., agent for J. G. S., it was improper to admit parol proof that the sale was to J. G. S.

When a party states that he "was acting as agent for his brother," in a certain transaction, *non constat*, but that he might have been so acting on his own assumption and without any authority. Neither the declaration of a party, nor his acts, can be given in evidence to prove that he is the agent of another.

Points and Authorities of Plaintiff in Error.

I. The bill of sale and receipt of purchase money, a copy of which appears in the case, (see folios 14, 15,) is not such a written contract as cannot be varied by parol, even had the action been between the parties to the bill or receipt.

II. There is no rule of law which will preclude a party from showing the fact of ownership of property as against a wrong doer, by parol or other evidence.

III. The sale of the furs to Sencerbox, and payment of the purchase money, and the notice of that fact to Ferrier, the holder or bailee of the property, and the request of Sencerbox

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to Ferrier to hold the property subject to his order, and a delivery of that notice and request to Ferrier by Burdick, the vendor, was a full and perfect delivery of the property to Sencerbox; 1st, because there was nothing left for the vendor to do in the premises; 2d, because the vendor parts with all control or right to control the property, and the right of Sencerbox to control the property, attached *eo instanti* upon the payment of the purchase money, as against Burdick, the vendor, and against all other persons except *bona fide* purchasers for a valuable consideration, without notice; 3d, because, when Burdick, the vendor, delivered the notice to Ferrier of the sale of his entire interest in the furs to Sencerbox, then that was a delivery to the agent of Sencerbox for the use of Sencerbox, and consequently was a perfect delivery to Sencerbox.

IV. There was no uncertainty in the transaction; nothing remained to be done except to compute the number of the skins between Sencerbox and Ferrier, as partners, and to determine their respective grades by the market, which, it appears by the testimony of J. W. Sencerbox, was to be done by him. Burdick had nothing further to do in the premises.

V. The title of property passes as between the parties when a sale for a valuable consideration is completed without either payment or delivery. *Hoban vs. Bidwell*, 16 *Ohio, Rep.* 509. See also *Willis vs. Willis*, 6 *Dana, Rep.* 59, 60; *Wing vs. Clark*, 24 *Maine Rep.* 366; *Olyphant vs. Baker*, 5 *Denio*, 379.

VI. If the sale was valid between the parties, it is valid against a judgment creditor; a judgment creditor is not a *bona fide* purchaser for a valuable consideration, because a judgment creditor comes in under, and not through, the judgment debtor. See 2*d Minn. Rep. Greenleaf vs. Edes, et al.*, 271, and cases there cited.

Points and Authorities of Defendants in Error.

I.—The Plaintiff failed to make title to the property for the recovery of the value of which he brought this action.

The bill of sale under which he claimed title was made to J. W. Sencerbox, and not to him. J. W. Sencerbox was the

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contracting party, and the addition of "agent for J. G. Sencerbox" is only a description of the person—a fact stated and to be proved to identify J. W. S. as the contracting party. That part of the contract relative to the delivery of the property is "unto the said J. W. Sencerbox," without the addition, and so is the purpose of the delivery as stated in the writing. If the title ever passed from Burdick, it passed to J. W. and not to J. G. Sencerbox. This is very clear from the language of the writing, and the notice to Ferrier confirms it. 1 *Cow. Tr.* 75, 2 *ed;* 6 *John. R.*, 94; 7 *Cow. R.*, 454; 10 *Wend. R.*, 87; 7 *Mass. R.*, 19; 20 *Wend. R.*, 251; 8 *Mass. R.*, 103.

II.—Parol evidence was not admissible to change the parties to the contract, or its legal effect. It is not simply a receipt, but it is a receipt of money on a contract, the terms of which and parties to which are defined in it. Such contract is just as unchangeable in its terms, and just as independent of parol evidence, as if the same terms were reduced to the most approved form and signed by the parties, and the receipt simply endorsed thereon.

It matters not in what capacity J. W. S. was acting, or pretending to act, when he made the contract, or whose money he paid. Those facts cannot change the contract as made from one party to another. The intention of the contract, as well in regard to parties as to terms, must be determined by the names and language used in the writing, and a failure to meet the intention cannot be supplied by parol to change either the parties or terms. 1 *Greenlf. Ev.*, *sec.* 275-76, *&c.;* 11 *Mass. R.* 27; 4 *Hill R.* 104-7; 20 *Wend. R.*, 251.

III.—Even though it be admissible to prove by parol that J. W. S., in making such contract, was acting as agent for his brother (Plaintiff), he fails to show that he, in fact, was such agent. He does not show that he ever derived any authority from Plaintiff to make any such contract for him. For aught that appears to the contrary in the evidence, his acting as agent was a pretence—an assumption. It certainly does not appear affirmatively or positively, as it should, that the Plaintiff ever employed J. W. S. to make such contract or authorized him to pay money on it. There does not

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appear in the case any fact, either prior or subsequent to the contract, connecting the Plaintiff with the contract, in any manner binding him to its terms, or vesting him with any rights under it. 2 *Greenlf. Ev., sec.* 59-60, *&c., Title* "*Agency*"; *Ham. Pr. and Agt.*, 312; 1 *Camp. R.*, 478; 1 *Esp. Cas.* 83.

IV.—The contract was executory. The title to the property had not passed at the time the Defendant took it. In fact it never passed.

The quantity was not known. The property had never been seen by either the vendor or purchaser. An examination, assorting and connecting, was necessary to complete and execute the contract.

The qualities, and the quantity of each quality, were unknown, undetermined, and the contract could not be executed without an examination and assorting of qualities. That remained to be done.

The prices of the inferior grades were not fixed, nor were the means of fixing them afforded by the contract. Those remained to be agreed upon.

Neither the property included, or intended to be included in the contract, or the amount to be paid for it, was identified or fixed by the contract, but remained for future action to determine both, before it could be executed.

So long as any of these things, or any one of them, remained to be done, the contract was executory, and the title remained in the vendor, whatever may have been the terms of it. The statement in the contract that the vendor delivered the property, does not constitute a delivery, or change the title. The facts show that there was not, in fact, a delivery,—that there could not be; for even the identity of the property was unknown to either of the parties. 1 *Cow. Tr.* 50, 2 *ed.*; 15 *John. R.*, 349; 3 *Mason R.*, 112; 15 *Wend. R.* 221; 7 *Cow. R.* 85; 5 *Cow. R.*, 250; 2 *Kent Com.*, 495-96, 3*d ed.*; 2 *Com. R.* 256; 5 *Denio R.*, 379; 2 *Hill R.*, 137.

L. M. Brown, Counsel for Appellant.

A. G. Chatfield, Counsel for Respondent.

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By the Court—ATWATER, J.—The Plaintiff in Error brought suit to recover the value of certain furs, of which he claimed to be owner on the 3d day of May, 1861, alleging the same to have been wrongfully taken by the Defendant, and converted to his own use. The answer denied the ownership of the Plaintiff, alleging the property belonged to one Burdick, and justified the taking under an execution against Burdick. A jury trial was waived, and the cause tried by the Court, and judgment rendered for the Defendant. The Plaintiff brings the cause to this Court by writ of error.

No evidence was introduced on the part of the Defendant, the motion for judgment having been made on the pleadings, and evidence introduced by the Plaintiff. That evidence was brief, as stated in the paper book, and the material part as follows:

"The Plaintiff produced Jarvis W. Sencerbox as a witness on behalf of said Plaintiff, who, being duly sworn, testified as follows, to-wit: The Plaintiff is my brother; I purchased of Burdick the undivided half of the furs in Mr. Ferrier's possession on the 3d day of May, 1861; exhibited bill of sale, of which the following is a copy;

'Received, Shakopee, May 3, 1861, from J. W. Sencerbox, agent for J. G. Sencerbox, of the city of Brooklyn, in the State of New York, the sum of fifty dollars on account of furs now in the possession of James Ferrier, the undivided half of which I have this day sold to the said J. W. Sencerbox, agent for the said J. G. Sencerbox, at the following prices, viz.: No. 1 mink, one 50-100 dollars; No. 1 Otter, four dollars; muskrat, twelve cents; red fox, one dollar 25-100; prairie wolf, seventy-five cents; coon, fifty cents; inferior grades at proportionate rates; and in consideration of the payment as aforesaid, I have delivered unto the said J. W. Sencerbox the undivided half of said furs, now in possession of said Ferrier, to take possession of or dispose of as he, the said J. W. Sencerbox, may desire. V. H. BURDICK.'"

The witness was then asked this question: "In what capacity were you acting in purchasing the property?" which was objected to on the ground that it tended to vary and

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change the written contract. The objection was overruled, and the witness answered, "I was acting as agent for my brother."

The witness was also asked, "with whose money the payment was made?" which was also objected to by Defendant, the objection overruled, and the witness answered, "I paid him a certificate of deposit on the Bank of Commonwealth, sent me by my brother; it was my brother's money. I sent a written notice to Mr. Ferrier by Mr. Burdick, on the day that I made the purchase. I know that Mr. Ferrier received the notice." Notice produced and read in evidence as follows:

"SHAKOPEE, May 3, 1861.

"*Mr. James Ferrier:* Please retain in your possession the undivided half of the furs this day sold me by V. H. Burdick, until otherwise directed by me. Yours truly,

"J. W. SENCERBOX."

On cross examination the witness testified: "I never saw the property myself. I took Mr. Burdick's word for the property. I had no personal knowledge that he had any such property. I understood that the property was at Louisville about six miles from here. It was not ascertained at the time how many of number one, or of a lower grade of fur there was at the time of the sale. I did not know how many mink skins there was at all. It had got to be ascertained afterwards how much of the $50 was to apply on the mink skins, but I expected there would be more than $50 worth. There were no prairie wolf skins at all. I did not know how many coon skins there were at the time. There was no understanding between Mr. Burdick and myself as to the price of the inferior grades of fur, further than that stated in the bill of sale. The number and quantity had got to be ascertained afterwards. I supposed there was more fur, and Mr. Burdick said he supposed there was more at the time of sale."

There was some further testimony, but not materially changing the above, and no other as to the person to whom the sale was made, or as to the agency of J. W. Sencerbox.

It will be observed, that J. W. Sencerbox testifies in the first instance that he purchased the furs of Burdick. The bill

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of sale also introduced in evidence, by the plaintiff, shows that the furs were sold to J. W. Sencerbox, and delivered to him, so far as any delivery is shown. It is true he is designated as "agent for J. G. Sencerbox," but this must be regarded as *descriptio personæ*, as the terms of the instrument are direct and positive that the sale was made to J. W. Sencerbox. When an agent or attorney contracts on behalf of his principal, he must do so in the name of the principal, or the latter is not bound. When any one has authority to do an act, it should be done in the name of him who gives the authority, not in the name of the agent or attorney. 7 *Cow.*, 453, 9 *Cow.* 76, 7; 10 *Wend. R.*, 87; 20 *Wend.* 251; 24 *Wend.* 345; 7 *Mass.* 19, 8 *id.* 103; 6 *Hill*, 240.

With reference to the instrument in writing signed by Burdick, which was introduced by the plaintiff in evidence, I do not think it was competent for the plaintiff to contradict or vary it by parol. It is obviously more than a simple receipt, and is more analogous to a contract of sale. It contains the names of the parties to the contract, the terms and conditions of sale, and attempts to make or show a delivery of the property. And though a mere receipt acknowledging payment of money may be varied or contradicted by parol, yet where it contains an agreement, condition or stipulation between the parties, it is in the nature of a contract, and is not liable to be varied by parol. 3 *Cow. and Hill's notes to Phil. on Ev.* 383; 4 *id.* 582, and cases cited. At all events, the plaintiff must take the instrument as a whole, if at all, and cannot claim the benefit of a part, and reject such parts as he thinks prejudicial to his case. With the instrument remaining in evidence, it was improper to admit parol proof to show that the sale was to J. G. Sencerbox, the plaintiff, instead of to his brother. It will also be observed in connection with the consideration of the point, as to whom the furs were sold, (as disclosed by the written evidence,) that the notice served on Ferrier, by J. W. Sencerbox, speaks of the furs as "this day sold *me*" by Burdick, without any reference to his capacity as agent.

But there is still another objection to the plaintiff's right of action, even though all the evidence had been properly

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received. The plaintiff entirely fails to show that J. W. Sencerbox was in fact his agent in the purchase of these furs. All the testimony tending to prove such fact is in the answer to the two questions above cited, and taken under objection. Sencerbox testified that in making the purchase he acted as agent for his brother. But neither the declarations of a man nor his acts can be given in evidence to prove that he is the agent of another. 3 *Cow. and Hill's notes to Phil. on Ev.* 412, and cases cited. But the witness does not even state that he was actually the agent of J. G. Sencerbox, nor that he was ever employed by him, for the purpose of purchasing furs, or for any other purpose, nor that he was furnished with money for such purpose. He merely states that he "was acting as agent for his brother," but *non constat*, that he might have been so acting on his own assumption, and without any authority. So far as the testimony appears, there is no privity of contract between the plaintiff and Burdick, nor any right of action on the part of either as against the other, for breach of contract. No original authority from plaintiff is shown to his brother, nor any ratification of his acts, unless bringing suit be considered such, and no authority whatever is shown from plaintiff for commencing the action. We think the plaintiff fails in making title to the property which is the subject of the action. This view of the case renders it unnecessary to examine the other points raised on the argument. The judgment below is affirmed.

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GODFRIED SCHMIDT, Plaintiff in Error, *vs.* JOHNSON COULTER, Defendant in Error.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

Action for rent of land. Defendant pleaded as a counter claim a demand against the Plaintiff for contribution as co-surety with the Defendant on an appeal bond, in a matter entirely distinct from the Plaintiff's cause of action, the Defendant having paid the whole amount. Whether such a demand is the proper subject of set-off or counter-claim—*doubted.*

In an action against a co-surety, upon an appeal bond, the principal not being made a party, whether the surety can claim contribution against his co-surety without showing the insolvency of the principal—*doubted.*

Where one of two or more co-sureties obtains in any manner a security for the debt, he holds it for the benefit of all the other sureties, and must do no act, nor voluntarily omit to do any act, by which such security is depreciated or lost, but must faithfully appropriate it to the payment of the debt, or he will be chargeable with the amount of the security to his co-sureties, in an adjustment of their proportions of the debt.

Points and Authorities of Plaintiff in Error.

I.—When one of the co-sureties has paid the debt of his principal, the other co-surety becomes primarily liable to the surety who paid the debt for one-half of the amount so paid; and nothing short of a collection of the debt from the principal will discharge such co-surety from his liability to contribute one-half the amount so paid. 1 *Parsons on Contracts*, *p.* 32-3-4, *and notes*; *Smith's Lead. Cas.*, *vol.* 1, *p.* 200, *sec.* 71, *and authorities there cited*; *Cornell vs. Edwards*, 2 *Bosanquet & Pullers*, 268.

II.—The referee erred in refusing to allow the counter-claim of the Defendant upon the facts so found by him, and the judgment reported and entered in the action should be modified by deducting from the amount reported by the Plaintiff, the sum of $28.49 and interest since November 7, 1855, making in the aggregate forty and 51-100 dollars; leaving a judgment in favor of the Plaintiff for nine and 64-100 dollars.

Points and Authorities of Defendant in Error.

The facts found show that said Schmidt commenced an ac-

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tion and secured by attachment and found more than sufficient to pay off the alleged joint liability of Schmidt & Colter, and that Schmidt, by his own neglect, surrendered and abandoned the security thus obtained, and having done so is chargeable with the amount and cannot legally demand contribution.

As a surety is entitled to every remedy which the creditor had against the principal debtor to enforce every security, so also on a like principle we claim, a surety who pays the debt of the principal and puts the means of indemnity off his own hand by his own acts or negligence, cannot come back upon a co-surety for a contribution of the sum paid; having once obtained means to reimburse himself, he is alone responsible for the loss and the co-surety is discharged. The privilege of enforcing the money from the principal was a valuable one to both and ought notto have been intercepted by one of them to the prejudice of the other; yet by his voluntary negligence the Defendant has deprived the Plaintiff of his rights or benefits and cannot now have recourse on him for his, the Defendant's own loss. See 5 *Barb.*, 398; 16 *Mass.*, 40; *Davis vs. Willis*, 4 *Minn.*, 1.

The Plaintiff in Error having paid the amount of said judgment, voluntarily and before the officer's return of no property of principals found, is not entitled to maintain action for contribution, (without showing that the principal was insolvent). See *Skillen vs. Millen*, 16 *Mass.*, 40.

The sum claimed as offset by Plaintiff in Error is not a matter of counter-claim. *Morely vs. Ingalls*, 5 *Sc.*, 314; *Hardcastle vs. Hardcastle*, 5 *B. & Ald.*, 94; *Crawford vs. Sterling*, 4 *Esp.*, 207; *Addison on Contracts*, 1189; 4 *Esp.*, 209.

There was nothing more than an implied promise to bear a portion of the debt in the contingency of their becoming liable (and by a failure of principal to reimburse), and it could only be known to what extent the Plaintiff (Defendant in Error,) was liable when it was ascertained what was his proportionate share of said debt, which can only be adjusted by agreement between the parties or by judicial proceedings of adjustment, as appears by a great number of authorities. See *Peter vs. Rich*, 5 *C.* 1 *Ch. R.*, 35; *Hob vs. Harrison*, 25 *and* 27 *C.* 2 *Cha. Ca.*, 246; *Finch's Rep.*, 15, 203.

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Payment of the whole debt by Defendant does not *per se* render Plaintiff liable for the one-half.

When one of two sureties receives property to indemnify him, and upon sale thereof such secured security paying the debt, is not entitled to contribution from his co-surety. *Chitton vs. Chapman*, 13 *Miss.*, 470; and a like principle is held in the case of *Fetor vs. Pierce*, 12 *B. Mon.*, 399.

A surety must show the insolvency of the principal before he can proceed against the co-surety for a contribution, and certainly time must be considered where the rights of the parties are materially varied. *Atkinson vs. Stewart*, 2 *B. Monroe*, 348, 350; *Morrison vs. Poynts*, 7 *Dana*, 307.

If a surety derives security from the principal, it enures to the benefit of all the sureties. 5 *Barb. S. C.*, 399; 6 *Vt.*, 136; 24 *Ala.*, 285; 21 *Vt.*, 94; 26 *Vt.*, 312.

Surety indemnified by principal cannot recover contribution from a co-surety for money paid by him, but must indemnify himself out of the means placed in his hands. *Morrison vs. Taylor*, 21 *Ala.*, 779; *West vs. Bank of Rutland et al.*, 19 *Vermont*, 408.

Sanborn & Lund, Counsel for Plaintiff in Error.

Smith & Gilman, Counsel for Defendant in Error.

By the Court—Flandrau, J.—There is no case or bill of exceptions bringing up the testimony. We are therefore confined to the report of the referee in making our review. We must presume that sufficient evidence was introduced without objection to sustain all his findings of fact, regardless of the allegations or want of allegations in the pleadings.

The action was for rent of land. The defence was a claim against the Plaintiff for contribution as co-surety with the Defendant on an appeal bond, in a matter entirely distinct from the Plaintiff's cause of action, the Defendant having paid the whole amount. This defence was answered by showing that the Defendant had sued the principal debtor, and garnisheed one Jackson, who held property of the principal to an amount sufficient to satisfy the debt, and had obtained a

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judgment for the full amount against both principal and garnishee, but by his neglect had not prosecuted the suit on appeal until Jackson had become insolvent and the security lost.

Whether such a claim is the proper subject of setoff or counter claim, is quite doubtful. *Comp. Stats.*, 481, *secs.* 23, 24; *Ib.* 541, *secs.* 70, 71, 73; *Gates vs. Smith*, 2 *M: R.* 30. The ground of relief in such cases does not stand upon any notion of mutual contract between the sureties to indemnify each other in proportion, but it arises from principles of equity independent of contract. 1 *Story Eq. Jur.*, *sec.* 493, *and note* 1, *on p.* 546. See also *Maddocks' Chancery*, *Vol.* 1, *p.* 235. It is very doubtful also whether a surety can claim contribution against his co-surety, without showing the insolvency of the principal when the suit is against the co-surety alone, the principal not being made a party. 1 *Maddocks' Chancery*, 236; *Adams' Equity*, *p.* 609, *and note.* But in this case the whole matter seems to have been litigated, and the decision made upon the question whether the Defendant, by failing to follow up his judgment against the garnishee, Jackson, until he became insolvent, had lost his claim for contribution against the Plaintiff. It is not found by the referee, that the judgment recovered by the Defendant against the principal debtor has been in any manner impaired. Nothing is said one way or the other about the solvency or insolvency of the principal, and nothing appears but that the judgment may be enforced against him at any time the Defendant is disposed to move in it; but the referee finds that the delay and subsequent insolvency of the garnishee is such a loss of a valuable security which was held for the benefit of both the sureties, as to defeat the claim for contribution. This reason is well enough as far as it goes; because, when one of two or more co-sureties obtains in any manner a security for the debt, he holds it for the benefit of all the other sureties, and must do no act, nor voluntarily omit to do any act, by which such security is depreciated or lost, but must faithfully appropriate it to the payment of the debt, or he will be chargeable with the amount of the security by his co-sureties, in an adjustment of their proportion of the debt. *Willis vs.*

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Davis, 3 *Min.R.* 17, 28. In this case the Defendant, after having paid the surety debt, recovered a judgment against the principal and a garnishee. He has lost the judgment against the garnishee, but not against the principal debtor; and nothing appears but that he may collect it at any moment. Now, can he maintain an action for contribution against his cosurety under such circumstances? I think not.

As the case appears in the record furnished this Court, the referee decided correctly in not allowing the claim for contribution, but the decision should not rest solely upon the discharge of the garnishee through the negligence of the Defendant. There are better answers apparent in the record.

Judgment affirmed.

JOSEPH B. WYKOFF, Plaintiff in Error, *vs.* IRVINE, STONE & MCCORMICK, Defendants in Error.

ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

Certain bankers gave their written receipt for money, "to be loaned out. We to account to the owner for principal and interest, less our charges, &c., not to exceed 2½ per cent. per annum." This contract created between the parties the relation of principal, and broker or agent. The agents were only limited in their conduct to the observance of good faith, and the exercise of proper care and circumspection. If they acted in good faith and loaned the money to a party solvent at the time of the loan, they are protected, notwithstanding such party subsequently became insolvent. Parol evidence, tending to show that the money was to be loaned for a period of six months from the time of its receipt, and that the brokers were to be liable for the amount and interest, would be in direct conflict with the terms of the receipt, and could not be received to contradict its written terms.

Points and Authorities of Plaintiff in Error.

The questions material in this case arise, and the case depends upon the construction of a written instrument set out "*in hæc verba*" in the complaint, and the Plaintiff in Error claimed,

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I.—That an agreement or undertaking to account for a certain sum of money is equivalent to a promise to pay said sum of money, and that to account in such a case requires something more than a simple statement or information as to what has been done with the sum of money or thing to be accounted for and means to answer for it in a responsible character and manner. *Bayley on Bills, p.* 5, and the authorities there cited.

II.—The undertaking of the Defendants was to account for the principal and interest, and it fully appears from the complaint that when an account was demanded they simply presented a worthless note to the Plaintiff. This did not and could not answer the promise and undertaking. It was not accounting in any legal sense for the principal and interest.

III.—The presenting of any note was not in any event an accounting within the terms and conditions of the contract; and the Defendants, failing to account, became liable to pay the Plaintiffs the said sum of money and interest.

Points and Authorities of Defendants in Error.

I.—The words employed in a contract must be understood according to their plain and popular sense—their strict and primary acceptation, unless they have generally, in respect to the subject matter, acquired a particular meaning distinct from their ordinary or primary one; or unless, from the context, it is manifest that they were used in a different sense; or because, in their plain, popular or primary signification, they are incapable of being carried into effect. *Chitty on Contracts*, 79, 80, *and note.*

II.—Not only the written instrument set out in the complaint itself, as well as every attending circumstance in this case, indicate the Defendants in Error as the agents for the Plaintiff, to make for him a loan of the money entrusted to their care, and that their undertaking was simply to account to him as agents, nothing more. That parol evidence, in the absence of fraud or mistake, is inadmissible to explain or vary, add to or enlarge the terms of a written instrument.

III.—The offer of the note, upon which his money was

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loaned under the agreement between the parties, was an accounting in contemplation of the writing itself, as well as the law governing the relations of principal and agent, and more than they were obliged to do, as no commissions were offered or demanded.

SANBORN & LUND, Counsel for Plaintiff in Error.

D. COOPER, Counsel for Defendants in Error.

By the Court—FLANDRAU, J.—The Defendants were bankers. The Plaintiff left with them the sum of four hundred and twenty-five dollars to be loaned out by them, and took from them the following paper:

"ST. PAUL, M. T., July 24, 1857.

"Received of J. B. Wykoff, Esq., four hundred and twenty-five dollars in American gold, to be loaned out. We to account to him for the principal and interest less our charges, &c., not to exceed two and one-half per cent. per annum.

"IRVINE, STONE & MCCORMACK."

This transaction created between the parties the relation of principal, and broker or agent, to loan money. It confides to the Defendants the entire control of the loans that were to be made with the money, leaving it to their judgment and discretion to select the borrowers, determine the security to be taken, fix the times of the loans, and regulate all other matters concerning them. They were only limited in their conduct to the observance of good faith, and the exercise of proper care and circumspection. They loaned the money out to some one, and collected it in again with interest, which had swelled the amount to the sum of five hundred and seventy-five dollars. They subsequently re loaned it with the accumulated interest, and took as security a note. The maker of the note subsequently became insolvent, and the note worthless. There is no charge of either bad faith or mismanagement in the making of this second loan; only that the note at the time the Defendants were called upon for an accounting was worthless. If the Defendants acted in good faith and loaned the money to a party solvent at the time of the loan, they are

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protected. *Loitard vs. Graves*, 3 *Caine's Rep.*, 226; *McKinstry vs. Pearsoll*, 3 *John. R.*, 319; *Van Allen vs. Vanderpool*, 6 *John. R.*, 69; *Robertson vs. Livingston*, 5 *Cow.*, 473; *Corlies vs. Cumming*, 6 *Cow.*, 181.

The complaint however alleges that the money was to be loaned for a period of six months from the time of its receipt by the Defendants, and that the Defendants, without the knowledge or consent of the Plaintiff, reloaned it after the expiration of the six months, and also that the Defendants were to be liable and responsible to the Plaintiff for the amount and interest. These allegations are in direct conflict with the terms of the paper signed by the Defendants at the time they received the money, and could not be given in evidence to contradict it. The relation of the parties to each other was fixed by the writing, and could not be changed by parol. They were agents vested with full discretionary powers to loan the money, and some bad faith, or gross negligence amounting to fraud, must be charged to make them personally liable.

The demurrer was well sustained.

Judgment affirmed.

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JOHN L. ANNAN, Plaintiff in Error, *vs.* WARD W. FOLSOM, Defendant in Error.

ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

The certificate of a Notary Public to the acknowledgment of a deed is not conclusive evidence of the facts certified by him, but the same may be rebutted by proof.

F. executed, acknowledged and delivered a mortgage upon certain real estate belonging to his wife. The wife signed the mortgage and the Notary certified that she acknowledged the same on a private examination, separate and apart from her husband. The facts proved that she had never in any manner acknowledged the same, and that she had never received any part of the consideration named in the mortgage. *Held*, that the acknowledgment on the part of the wife, required by statute, is an essential part of the execution of the instrument, without which no interest in the estate passes, and without such acknowledgment the mortgage is invalid so far as the separate estate of the wife is concerned. See *Dodge vs. Hollinshead*, *ante*, *p.* 25.

Points and Authorities for Plaintiff in Error.

The certificate of the acknowledgment to a deed affixed thereto by an officer empowered to take acknowledgments, and regular upon its face, is conclusive evidence of the matters contained therein, and cannot be aided or disproved by parol testimony. 44 *Maine*, 25; 4 *Greenleaf's Cruise on Real Property*, *title* 32, *ch.* 2, *sec.* 24, *note* 1; 3 *Whart.*, 457; 1 *Tayl.* 139; 6 *Blackf.*, 475; 1 *Har. & McHen.*, 211; 3 *ib.*, 321; 6 *J. J. Marsh*, 532; 6 *Texas*, 208; 26 *Eng. L. & Eq.*, 508; 30 *ib.*, 543, *and note.*

II.—As between parties to a mortgage the certificate of acknowledgment is unnecessary to its validity, provided its execution and delivery be proved. 28 *Barb.*, 421; 3 *McLean*, 362; 2 *Black.*, 32; 4 *Green.*, 82; 7 *Shepley*, 413; 5 *B. Monroe*, 471; 5 *Blackf.*, 92; 13 *N. H.*, 389; 12 *Met.*, 157; 2 *Foster*, 468; 6 *Mass.*, 24; 21 *Miss.*, 307; 5 *Cal.*, 315; 17 *Barb.*, 662.

III.—Under our statute a *feme covert* has all the ability of a *feme sole* to acquire, hold and alien her estate with the single exception that she shall not alienate her lands without the consent of her husband. *Pub. Stat.*, *ch.* 5, *sec.* 2; *ib.*, *ch.* 61, *section* 105. And it is questionable if she could not exercise these rights without the aid of the statute. *Blackstone's Com.*,

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vol. 1, *book* 2, (*Chitty*) *p.* 236, *note* 12, *and the authorities there cited; Adams' Eq., p.* 45, *and authorities there cited*; *Willard's Eq. Jur., p.* 643.

And there seems to be no good reason why a married woman, after all her disability to hold and convey real estate is removed, with the exception that she must have her husband's consent, should stand in any different position as to the rights and liabilities from that of a *feme sole* as men generally, with that exception.

In this case the Defendant asks the Court to adopt the novel principle that a *feme covert* may act negligently and carelessly in regard to her separate property, and in such a manner as to induce other and innocent parties to part with their property on the strength of her acts, and when such parties claim their legal rights, which they have every reason to believe she has given them, and upon the strength of which they have acted, the plea of the disability of coverture shall be a bar to them all. There is no pretence of fraud or imposition in this case, and it would be strange if the disabilities of coverture or infancy could be used to shield parties from their legal and assumed liabilities. 4 *Barb.*, 553, *Strong vs. Skinner.*

Points and Authorities for Defendant in Error.

I.—The execution of the mortgage by Sydnia Folsom, the wife, is expressly denied and put in issue by the pleadings, and the evidence shows, and the Court below finds as a fact, that she did not execute it.

1st. Because the mortgage was not executed by her in the presence of two subscribing witnesses, nor in the presence of any witness, as is required by the statute, *page* 398, *sec.* 8.

2d. Because there was no acknowledgment taken of the said wife Sydnia to the said mortgage by any one. *Statute, page* 395, *sec.* 44, *entitled of* "*Powers*;" 5 *Curtis' Decisions U. S. Sup. Ct., p.* 173, *Clark vs. Graham*; 6 *Wheat., p.* 377; 6 *Bacon's Abridgement, p.* 377; 1 *Hill, p.* 121, *Gillet vs. Stanley;* 4 *Mich., p.* 567, *Dewey vs. Campow*; 16 *John., p.* 113, *Jackson vs. Stevens*; 20 *ib., p.* 301, *Jackson vs. Cairus;* 8 *Cow.*

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page 277, *Doe vs. Howland;* 17 *Wend., page* 540, *People vs. Galloway*; 13 *Conn., page* 192, *Sinsley vs. Brown*; 2 *Hill., p.* 240, *Constantine vs. Van Winkle;* 12 *Ohio, page* 364, *Good vs. Zercher*; 1 *Hill. on Real Property, page* 89, *and notes*; 1 *Manning*, 383.

II.—The certificate of acknowledgment is not conclusive that the instrument was so acknowledged; the evidence which the certificate furnishes is *exparte*, and its validity may be enquired into, and disproved, by any party affected by it. See *Statute, ch.* 36, *sec.* 26, *p.* 400; 4 *Johnson, page* 162, *Jackson vs. Schoonmaker*; 12 *Johnson, page* 472, *Jackson vs. Hayner*; 2 *Wend.*, 317; 24 *Wend., p.* 91, 92, *Thurman vs. Cameron.*

SANBORN & LUND, Counsel for Plaintiff in Error.

M. E. AMES, Counsel for Defendant in Error.

By the Court—ATWATER, J.—This was an action of forcible entry and detainer, brought by the Plaintiff in Error before a Justice of the Peace, to recover the possession of certain premises claimed by the Plaintiff as the purchaser at a public sale upon a mortgage foreclosure by advertisement. The Justice rendered judgment of restitution of the premises in favor of the Plaintiff, from which Defendant appealed to the District Court of Ramsey county. A jury trial having been waived, the cause was tried by the Court, and the following among other facts, were found by the Court, viz.:

That at the time of the giving the mortgage upon the premises in question, Sydnia Folsom, wife of the Defendant Ward W. Folsom, was lawfully seized in fee simple, and owned in her own right, and free from the control of her said husband the lots described in the mortgage; that the Plaintiff in Error caused the mortgage to be prepared, and that said Defendant affixed his own signature to said mortgage, and Sydnia Folsom, at the request of said Defendant, also affixed her signature to the same without being informed by any one, and without any knowledge of the contents or nature of said mortgage, and of the fact that it in any way related to her said separate estate; that said Defendant then took said mortgage so signed by himself and wife to a Notary

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Public, and said Notary Public affixed his name and seal of office to the acknowledgment thereof, and did also, with one F. A. Rouleau, sign said mortgage as subscribing witnesses; that said Sydnia Folsom never in any form or manner acknowledged the execution of said mortgage, and never even saw the said Notary Public nor the said F. A. Rouleau, or knew that such instrument had been so executed, until long after the delivery of the same to Plaintiff in Error, and never in any way assented to said execution of said instrument, nor did any act whatever in relation to the execution of the same, except to affix her signature thereto as aforesaid.

Upon these facts the Court held the mortgage void and rendered judgment for Defendant. As the Court had occasion to pass upon precisely the same state of facts in the case of *Dodge vs. Hollinshead* decided at the present term, it is unnecessary to enter upon any further discussion of the question in this case.

The judgment below is affirmed.

WILLIAM FOWLER, et al., Appellants, *vs.* JOHN ATKINSON, Respondent.

APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY.

Under the State Constitution the District Court has original jurisdiction in all cases, whatever the amount involved, except over "estates of deceased persons, and persons under guardianship."

Under the act of March 5, 1853. *Stats. of Minn.*, p 480, a defendant in any civil action is expressly required to interpose all equities, claims and demands existing in his favor at the time of the commencement of the action, or intervening before a final decision, by way of answer, or supplemental answer, in the nature of a counter claim. If not so interposed in the original action, they cannot be set up, asserted or enforced by another action.

A Justice of the Peace has nothing to do with actions or defences of a purely equitable nature. If a party is sued before a Justice, and has a good defence to the action in equity, he may appeal to the District Court, and interpose his equities by way of answer, as if the action were originally commenced there. The refusal of that Court to allow time to interpose his equities does not confer upon him the right to make them the subject of another action.

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This action was brought to restrain the Defendant from collecting a promissory note made by Appellants to Respondent, which was the subject of an action then pending in the District Court of Washington county, wherein the above Respondent was Plaintiff, and the Appellants were Defendants, and which originated in Justice's Court, and involved the sum of $60, on the ground, as claimed by these Plaintiffs, that they, by mistake, had omitted to append the words "Trustees of Waterville School District, No. One, Washington county," to their names upon said note, and asking that the note be corrected by appending those words, and that the action founded upon said note be dismissed.

This cause came before the Court below at the April term for 1861, when a motion for judgment of dismissal, founded upon the complaint, was granted.

The case now comes before this Court on appeal.

Points and Authorities of Appellants.

I.—The Court has jurisdiction, the amount of the note, $139, sought to be reformed, and the mistake corrected, is wholly unpaid by Plaintiffs and Appellant, as they allege in their complaint, and the fact that Respondent alleges in his answer that it (the note) has been paid, except $60, does not deprive the Court of jurisdiction. It is the fact the Court will not inquire into. The pleadings determine, in this instance, the question of jurisdiction. The amount in controversy is $139, and not $60. *Comp. Min. R. S.* 54, *sec.* 5; *R. S.* 478, *sec.* 1.

II.—The mistake may be corrected, though made by the party seeking to correct the mistake, and parol evidence is admissible to prove the mistake, though the mistake is denied in the answer, and may be done, though the Appellants seek relief affimatively on the ground of the mistake, as well as though the Appellants had set it up as a defence to suit on the note, which they attempted to do. *Willard's Eq. Jur.*, 59, 54, 72, 73, 79, 74, 75, 76; 1 *John. C. R.*, 582; *Gillepni and Wife vs. Moon*, 2 *John. C. R.*, 585, 588, *and Buell vs. Stone*; 1 *Sim. & Stu.*, 210, 219, 220, 74; 1 *Vesey*, 317, 456; 2 *Vt. R.* 31; 3 *Vt.*, 203; 2 *P. Wm.*, 465; 3 *Vesey Jur.*; 473;

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5 *Vesey Jur.*, 395 ; 6 *Vesey Jur.*, 328 ; 1 *Day's Cases in Error*, 139 ; *Story Eq. Jur.*, *sec.* 110 ; 17 *Wend.*, 40 *and* 101 ; *Phil. Ev.*, 1428 ; 15 *John. R.* 1 ; 1 *Minn. R.* 266.

III.—The pleadings show that unless the mistake is corrected, and the note reformed, the Appellants will be subject unjustly to lose the payment of the note, when there is no blame or misconduct on their part ; and the pleadings show that the equity of Appellant is superior to that of Respondent. The agreement was that the Appellants were not to be personally responsible for the payment of the note, they being public officers, and not being liable as such. The note was given as evidence of the amount due from the district to Respondent, and if the note is reformed the contract will appear as it was made. 2 *Gill. & John.*; 64 ; *Wil. Eq. Jur.*, 59 ; *Story's Eq. Jur.*, *sec.* 109 ; 17 *Wend.*, 40 ; *Chitty on Con.*, 8 *Am. Ed.*, 211, *and note* ; *Olney vs. Wicks*, 18 *John. R.*, 123 ; *Adams vs. Whittlesey*, 3 *Conn.*, 560 ; *Ogden vs. Raymond*, 22 *Com.* 8, 384, 385 ; *Sanborn vs. Noel et al.*, 4 *Minn. R.* 126.

Points and Authorities of Respondent.

I.—The amount in controversy in this action is less than $100 ; to wit, the sum of $60. The District Court has original jurisdiction in civil cases only where the amount in controversy exceeds one hundred dollars. See *Art.* 6, *sec.* 5 *of Constitution of Minn.* ; 2 *Minn. R.*, 86.

II.—The complaint of Plaintiffs does not contain a statement of facts constituting a cause of action.

1. In that no equities are shown to exist in favor of the Plaintiff 's requiring the interposition of the Court.

2. In that it does appear by the complaint that the Plaintiffs have an adequate remedy at law.

3. In that the relief demanded could not be granted, and if granted, would not change the liability of Plaintiffs upon the instrument.

Because the Plaintiffs had no authority in the capacity of Trustees to bind Waterville School District by executing notes ; and

Because the Plaintiffs, by express contract, have substituted

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themselves in place of the District, and Courts do not undertake to make new contracts for parties, or relieve them from their acts and deeds, fairly done, with a full knowledge of facts, though under a mistake of law. See 2 *Kent*, 631, 2 *and* 3 ; 2 *Wheat.* 45 ; 5 *East. Rep.*, 148 ; 6 *Mass.*, 58 ; 13 *John.*, 307 ; 7 *Cow.*, 453 ; *Minn. Stats.*, 481.

For which reasons the judgment below should be affirmed.

NEWELL & TOMPKINS, Counsel for Appellants.

L. E. THOMPSON, Counsel for Respondent.

By the Court—EMMETT, C. J.—This is an appeal from a judgment of the District Court, dismissing the action. The action was commenced to restrain the Defendant from proceeding in another action pending in the District Court, wherein he seeks to recover against the present Plaintiffs an alleged balance of sixty dollars, claimed to be due on a promissory note given by them. The Plaintiffs also ask to reform said note by adding to their signature certain words, which they allege were omitted by mistake, and which would indicate the official character in which alone they claim to have signed the note.

The Defendant insists that the amount in controversy is less than one hundred dollars, and therefore that the District Court could have no jurisdiction of the action in the first instance. The question here raised is decided in the case of *Agin vs. Heyward*, argued at the present term, where we held that under the State Constitution the District Court has original jurisdiction in all cases, whatever the amount involved, except over estates of deceased persons, and persons under guardianship.

We are of opinion, however, that, under the act of March 5, 1853, (*Comp. Stats.*, 480,) the Plaintiffs should have interposed the equities which they seek here to enforce, as a defence to the original action, brought against them by the Defendant. The fifth, sixth, and seventh sections of the act referred to not only enable, but expressly require a Defendant in any civil action to interpose, if at all, all equities, claims and demands existing in his favor at the commencement of any such action, or intervening before a final decis-

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ion, by way of answer, or supplemental answer, in the nature of a counter claim, whether the same, by the former practice, were interposed or enforced by bill, cross bill, cross action, or bill of discovery.

One great object of this act seems to have been to avoid multiplicity of actions, by enabling and compelling parties to litigate all questions pending between them, and pertaining to the same transaction, in one legal controversy. And we accordingly must hold that such equities, claims or demands, as the parties do not thus interpose in the original action, cannot be set up, asserted or enforced by another action. The language of the statute is imperative—"shall be interposed, if at all."

The Plaintiffs, however, allege, as one of the grounds of equitable relief, that they endeavored to pursue the very course here suggested. That they attempted to interpose as their defence the same facts stated in the complaint in this action, but the Justice of the Peace "rejected the defence"; and when, after the appeal to the District Court, they made application for leave to file and serve an amended answer, containing these facts, that Court refused the application. We are unable to see how this relieves the case from the operations of the statute. A Justice of the Peace has nothing to do with actions or defences of a purely equitable nature. But if a party is sued before a Justice, and he has a good defence to the action in equity, I see no good reason why he may not appeal to the District Court, and then interpose his equities by way of answer, just as he would have the right to do were the action originally commenced in that Court. Either this right must be recognized, or the Defendant is wholly without a remedy. But it by no means follows, that the refusal of the District Court to permit the Defendant to set up such a defence, confers upon him the right to make his equities the subject of another action; because, if the Court has erred in this respect, a remedy may still be sought in the action in which the error was committed. See *Fowler et al., vs. Atkinson*, 5 *Minn. R.*, 505.

The judgment of the District Court dismissing the action is affirmed.

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MARTIN O. WALKER, Appellant, *vs.* HORACE E. BARRON, Respondent.

APPEAL FROM THE DISTRICT COURT OF RICE COUNTY.

Proof of particular customs is generally allowed to aid Courts and Juries in arriving at the intentions of parties, when they perform acts or make contracts, that are susceptible of more than one meaning. The custom must, however, be so well established in the particular locality, trade, profession or business, to permit its being proved, that all men transacting the business to which it relates, must be presumed to have knowledge of it, and to act and contract with reference to it. It must be shown that the custom existed at the place where, and the time when, the contract or act sought to be affected by it, was made or performed. It is only in exceptional cases that proof of an usage in one place is allowed to show that it existed in another.

In cases where a new trial is awarded for error committed by the Judge, the costs of the irregular trial should abide the event of the suit, and be recoverable by the party who ultimately succeeds.

Points and Authorities of Appellant.

I.—All contracts made in the ordinary course of business, without particular stipulations, express or implied, are presumed to be made in reference to any existing usage or custom relating to such trade, and it is always competent for a party to resort to such usage to ascertain and fix the terms of the contract. *Chitty on Con., 8th Am. ed.,* 83 *and note; Starkey on Ev., vol.* 2, *part* 1*st,* 362 *and note* 359 *and* 366; *Hinton vs. Locke,* 5 *Hill,* 437; 9 *Wheat.* 589 592.

II.—The rules of the common law, governing ancient and local customs and usages, are entirely inapplicable to those customs which, as in this case, are sought to be incorporated into contracts, on the ground that parties must have contracted with reference to them. See authorities cited to the last point. *Clark vs. Baker,* 11 *Met.* 186; *Parsons on Con. p.* 53 *and Note a, and* 56, *Note i; Bridgeport Bank vs. Dyer,* 19 *Conn.,* 136; *Thompson vs. Hamilton,* 12 *Pick.,* 424; 1 *Greenlf. on Ev., sec.* 295; *Leach vs. Beardelu,* 22 *Conn.,* 404; *Marcy et al. vs. Whaliny Ins. Co.,* 9 *Met.,* 363.

III.—If the evidence could have had any bearing, however slight, on the case, it was error to reject it.

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The Plaintiff claimed upon a "*quantum valebant.*" The Defendant alleged a special contract, at less than board furnished to ordinary boarders was shown to be worth, in consideration of the stoppage of his stages at the Plaintiff's hotel.

The evidence was conflicting. Can it be contended that in this state of the pleadings and evidence, proof that it was usual and customary in that particular business to make deductions for such considerations, would not have tended to corroborote Defendant's version of the contract, by affording a reasonable presumption that the parties must have made it with reference to such usage. *Week vs. Holmes*, 12 *Cush.*, 219; *Thompson vs. Hamilton*, 12 *Pick.*, 425-428.

IV.—The costs of the former trial were not properly taxable against the Defendant, this Court having rendered judgment in favor of Defendant, on appeal, and the order being made with reference to costs.

Points and Authorities of Respondents.

I.—No custom or usage of trade can be binding on the Plaintiff, or be allowed to be proved in Court, unless the same is established, known, uniform, reasonable, not contrary to law, and not excluded expressly or impliedly by the terms of the contract. 2 *Green. Ev.*, *sec.* 251, *p.* 240; 2 *Pars. Cont.*, 53 *and note*, *avd* 57; 1 *Smith L. C.*, 676-7; *Bowen vs. Stoddard*, 10 *Met.*, 380; *Stevens vs. Reeves*, 9 *Pick.*, 198-200; *Macomber vs. Parker*, 13 *Pick.*, 182-3.

II.—Evidence of a custom or usage of trade is only admissible to explain and show what the contract really is, and upon the hypothesis that the parties have contracted with reference to such custom or usage. It is never admissible for the purpose of aiding or varying a contract from that intended by the contracting parties. 2 *Pars. Cont.*, 50 *and note*, *and* 52 *note and* 59; *Kempton et al. vs. Swift et al.* 2 *Met.* 70; *Clark vs. Barker*, 11 *Met.*, 189; 1 *Smith L. C.*, 680 *and* 684-5.

III.—The answer of the Defendant does not allege any custom or usage, but alleges that the board was furnished under a special contract between the Plaintiff and Defendant, whereby the Defendant agreed to pay and the Plaintiff agreed to take

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a certain fixed price in cash per week for each boarder, and Defendant attempts to prove the allegation by his own testimony and the deposition of David S. Pratt, used on the trials. *Chit. Plead.*, 217; 1 *Black. Com.*, 76.

IV.—The question, by its terms, does not tend to elicit testimony of a custom whereby the Defendant is bound to confer any benefit upon the Plaintiff, or does confer any benefit on him, therefore it would be unreasonable, unjust and unlawful for such custom to be binding on the Plaintiff. Otherwise every action to collect a debt may be defended on the ground of custom.

V.—If the interrogatory ruled out by the Court below was inadmissible for any reason, this Court will not enquire upon what grounds the objection was made or the evidence excluded. The Court below had a right to exclude improper evidence, if no objection were made by Plaintiff's attorneys. If a new trial were ordered and the same interrogatory put to the Defendant, it must be ruled out again, whether for the same or other reasons would be quite immaterial. *Cooper vs. Barber*, 24 *Wend.*, 105 *and Farm. and Man. Bank vs. Whenfield*, *Id.*, 426.

VI.—As to costs, the usual practice is to require the costs and disbursements of a former trial to be paid as one of the conditions on which a new trial is granted, and sometimes even to require the costs of a successful application for a new trial, to be paid by the prevailing party on such application. *Ellsworth vs. Gooding*, 8 *How.* 1; *and Von Schonk vs. Winne*, *Id.* 5; *Gosling and wife vs. Acker*, 2 *Hill*, 391; *Hicks vs. Wattemin*, 7 *How.*, 370.

VII.—And always at least to allow the party ultimately prevailing to obtain a judgment for all his costs on a former trial in which he was successful, and sometimes when he was unsuccessful. *Fitch vs. Stevens*, 2 *Met.*, 506; *Anonymous* 1 *How.* (*N. J.*) 496, *cited* 4 *U. S. Dig.* 444, *No.* 169.

VIII.—Our practice is when a remittitur is ordered, as in this case, to allow the prevailing party in the Supreme Court his costs in that Court. The costs of the former trial to abide the final result. *Comp. Stat.*, 577, *sec.* 2; *24th*, *25th*, *and* *26th*

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Rules of Court, 1 *Minn. Rep.*, 453; 2 *Whit. Prac.*, 510; *see bill of costs, and Id.* 277.

COLE & CASE, Counsel for Appellant.

BATCHELDER & BUCKHAM, and BERRY & PERKINS, Counsel for Respondent.

By the Court.—FLANDRAU, J.—This action was brought to recover for the board and lodging of Defendant's stage agent, his drivers and men, and for stabling his horses and teams. The complaint alleges the value of the board and lodging of the men and drivers, and the stabling for the teams, and sets out a special contract for the board of the stage agent at four dollars per week.

The answer alleges that the men and drivers were to be boarded upon a special contract, for two dollars per week, the consideration for which was that the Defendant would run his stages and passengers to Plaintiff's hotel, and would give him the boarding and lodging of the men and drivers; and also sets up a special contract for the board of the agent at three dollars per week.

After conflicting testimony had been received concerning the existence of the special contracts alleged in the answer, the Defendant being upon the stand, was interrogated on his knowledge of the stage business, and disclosed that he had great experience therein, in Minnesota and elsewhere. He was then asked the following question:

"Do you know whether it is customary among hotel keepers to make any difference in their charges for board between persons employed in the stage business and others, when stages run regularly to their hotel?"

The question was objected to upon the ground that an usage, to be valid, must be fixed, certain, reasonable and general; established, known and uniform, and not contrary to law, and that the question did not tend to elicit testimony to this extent; also for irrelevancy, and to the form of the question.

Upon this objection the testimony was excluded, and no further attempt was made to follow up the subject by the Defendant.

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As one of the issues for the jury to pass upon was the existence of the contract to furnish the board and lodgings at a lower rate than claimed by the Plaintiff, the consideration for which was alleged to be the running of the Defendant's stages to the Plaintiff's hotel, proof of the existence of a custom to board such men lower than others would have tended strongly to support the theory of the Defendant, and been a corroborating circumstance in aid of his having made the contract. We think such a custom might have been proved in this case. There is nothing unreasonable in such a custom, nor does it in any manner conflict with the rules of law or policy. It would not have been admissible to influence the contract made by the parties, if it was found that one was made, but simply as rendering it more probable that they made such a contract. It was admissible upon the issue of contract or no contract.

Proof of particular customs is generally allowed to aid Courts and juries in arriving at the intention of parties when they perform acts or make contracts that are susceptible of more than one meaning. It is to place the Court in the position occupied by the party, and surround it with the same influences that operated or might have operated upon him when acting. "The law is not so unreasonable as to deny to the reader of any instrument the same light which the writer enjoyed." *Wigram on Extr. Ev.*, 57-8; 2 *Cow. & Hill's Notes to Phil. Ev.*, 505. They may, however, like any other facts or circumstances, be shown when their existence will increase or diminish the probabilities of an act having been done or not done, which act is the subject of contest.

A custom, however, must be so well established in the particular locality, trade, profession or business, to permit its being proved, that all men transacting the business to which it relates, must be presumed to have knowledge of it, and to act and contract with reference to it. It is only because the custom is supposed to have influenced the parties who act within the sphere of its operation that it is admissible at all. It must therefore be clearly shown that the custom existed at the place where, and the time when the contract or act sought to be affected by it was made or performed. It is only in some exceptional cases that proof of an usage in one place is allowed to show that it existed in another.

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The question propounded to the witness in this case, had no reference to the time when the contract was alleged to have been made, which was several years before, nor to the place where it was made. It did not even refer to the county or state. It did not call for an established uniform custom that had become the law of the business referred to. It was therefore irrelevant and properly ruled out.

The case was once tried and the Plaintiff recovered a judgment. An appeal was taken to this Court and the judgment was reversed for error of the Judge in admitting testimony on the trial, and a new trial was awarded, nothing being said by this Court as to costs. On the second trial the Plaintiff again had judgment, and claimed the right to tax the costs of the first trial in the Court below. In this he was right. In all cases where a new trial is awarded for error committed by the Judge, the costs of the irregular trial should abide the event of the suit, and be recoverable by the party who ultimately succeeds.

Judgment affirmed.

PATRICK KEOUGH, Appellant, *vs.* MARTIN MCNITT, Respondent.

APPEAL TO THE DISTRICT COURT OF RAMSEY COUNTY.

A new trial will not be granted upon the ground of newly discovered evidence upon an affidavit stating that *affiant is informed and believes* that certain parties will testify in a certain manner, if a new trial is granted. The affidavits of the witnesses should be produced when they can be obtained, and there should appear a sufficient excuse for not producing the testimony on the former trial.

Parol evidence is admissible in cases of written instruments, to prove collateral and independent facts about which the writing is silent; but not to vary the terms of the instrument.

Parties may, by express agreement, make the giving of a note or bill of exchange for the amount of an existing debt, operate as a payment of such debt; particularly where a new and additional consideration passes from the debtor to the creditor.

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The complaint alleges that on and prior to the 9th day of February, A. D. 1858, the Plaintiff had been engaged in the livery business in Saint Paul, and in connection with his said business had contracted certain debts which were then standing against him, among which was a note given by Plaintiff to Cave & Dunwell, dated August 14th, 1856, for seven hundred dollars, payable in one year, with interest at three per cent. per month, till paid. That on said 9th day of February, 1858, the Plaintiff sold and transferred an undivided half interest in all his livery property to one Wm. B. Langley; and that the copartnership was then formed between the Plaintiff and said Langley, under the name of William B. Langley & Co., for carrying on the livery business together, and that as a part of the consideration for forming the said copartnership, said firm assumed to pay the debts which were then standing against said Keough, among which was the said debt due to Cave & Dunwell. That said copartnership continued until about the 12th day of August, 1858, when the same was dissolved by the said Langley purchasing out Plaintiff's interest and assuming the payment of the debts contracted or assumed by the firm, at which time the said Langley and the Defendant, McNitt, executed and delivered to the Plaintiff a bond to pay said debts and keep the said Plaintiff free, clear and harmless from the same. The bond is quoted in the complaint in full.

The plaintiff further alleges that said Langley did not pay debts and liabilities contracted and assumed by said firm, and did not keep the Plaintiff free, clear and harmless therefrom; and specifies several debts, and among them the said Dunwell and Cave note, which the Plaintiff has paid and satisfied.

The allegation in the complaint as to the payment of the said Cave and Dunwell note, is, "that the said Plaintiff did, on the 23d day of April, 1859, satisfy and lift the same by the payment of the sum of $1,120 to the holders thereof." And the complaint demands judgment against the Defendant for the several amounts so paid by him, including the amount alleged to have been paid to lift the said Cave and Dunwell note.

The answer takes issue specially with the allegation of the

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complaint as to the Plaintiff's having paid the said Cave and Dunwell note, and also denies all other allegations in the complaint.

The case was referred to James Gilfillan, Esq., and after hearing testimony in the case, and arguments of counsel, made a report, and directed judgment in favor of the Plaintiff. Judgment was thereon rendered for the Plaintiff, on the 17th day of August, 1861.

In regard to the payment of the Cave and Dunwell note by the Plaintiff, the referee finds as follows: "On the 23d day of April, 1859, there being then actually due on the said note, payable to C. S. Cave and D. W. C. Dunwell the sum of $1,007 88, this Plaintiff paid and satisfied said note by giving to the holders thereof his other note for the sum of $1,120.

On the 22d day of November, A. D. 1861, counsel for the Defendant served notice of motion to set aside the judgment and report of referee, and to grant a new trial in said action, upon the usual grounds in such cases, and particularly upon the ground of newly discovered evidence, tending to show that the said Plaintiff had not paid the said Dunwell and Cave note of $700, as set forth in the affidavit of M. E. Ames, Esq., which was the only showing of newly discovered evidence on the part of the Defendant upon the hearing of said motion. In opposition to the motion upon the granting of newly discovered evidence, the affidavits of J. M. Gilman and John B. Brisbin were used in behalf of the Plaintiff.

The Court below granted the motion for a new trial, and Plaintiff appeals.

Points and Authorities for Appellant.

I.—It is not made to appear that any new evidence has been discovered or is in existence. The only affidavit in support of the motion is that of Mr. Ames, who merely states what Colonel John B. Sanborn told him in a casual conversation that Cave and Dunwell had said or testified to in another case. How Mr. Sanborn got his information does not appear. No affidavit of Mr. Cave or Mr. Dunwell, or any one else, is produced, setting forth what they know or will testify to upon

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the subject, nor are there any affidavits of any one that Cave or Dunwell, or any one else, that has ever told them, or stated in their hearing, what they would testify to upon the trial, or of any facts within their knowledge. And no reason is shown why the affidavits of Dunwell and Cave, Brisbin or Sanborn, are not produced. It is mere matter of hearsay, passing through two or three mouths, leaving it uncertain and indefinite where even Sanborn got a knowledge of the facts communicated to Mr. Ames. The statement in the affidavit that he expects to prove by other witnesses admissions by the Plaintiff that the note had not been paid, is also wholly insufficient, as not naming any witnesses, or stating positively that any such evidence is known, and as being cumulative and impeaching. *Graham and Waterman on New Trials, vol.* 3, *pp.* 1021, 1022, 1065, 1071; *also, vol.* 1, *pp*, 470-71, *and cases cited; Shurmway vs. Fowler*, 4 *John.* 425; *Dean vs. Morrell*, 1 *Hall Rep.*, 382; *Shephard vs. Shephard*, 5 *Halst.*, 250.

II.—No diligence is shown by the Defendant to procure testimony upon the trial of the character alleged to have been discovered. The Courts are very strict in requiring the party applying for a new trial upon the ground of newly discovered evidence to show with distinctness no want of diligence on his part. The authorities will be found collected in *Graham and Waterman on New Trials*, 472-486, *and page* 1026.

III.—If Dunwell and Cave had been produced upon the trial and testified just as Mr. Ames in his affidavit says that Mr. Sanborn told him they had stated or testified in the replevin action, it would not have changed the result. Cave only stated, as appears from the affidavit, that the note had not been paid at the time the horses were taken on the chattel mortgage, in 1857. Dunwell says the note was given for the consideration of the horses, and that it has not been paid. What has not been paid?—the note or the consideration money? It is not pretended that either of them would deny that the $1120 note had been executed and delivered to them and received by them in payment of the 700 dollars. The facts showing the payment are not denied. The decision of the referee would not have been changed by such testimony as the affiadvit discloses. *Graham and Waterman*, 1093.

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IV.—It appears conclusively from the evidence of John B. Brisbin and J. M. Gilman, that the note was paid and satisfied just as the referee finds.

If it is claimed that the old 700 dollar note could not be paid by the Plaintiff giving his new note for $1120, we have to say that though there are some cases in New York to the effect that a new note given for a precedent debt of the same party, will not operate as payment, even by express agreement, yet as shown by the cases referred to in 2 *Amer. L. C.*, *pp.* 180-1, and as the author well remarks, "The weight of authority in England and this country is decidedly in favor of the proposition that the new cause of action, arising from the receipt of a promissory note for a precedent debt, is a sufficient consideration to sustain an accord and satisfaction, even where the same parties are liable on the new and old note."

The New York courts are also veering back from their position upon this subject, as shown in the cases 5 *Hill*, 448, and 2 *Denio*, 410. But the case at bar does not fall within the principle of the New York authorities. The decisions of that State are based upon the proposition that a new note given for a precedent debt of the same party furnishes no consideration for a valid accord and satisfaction. Now in the case at bar, there was an additional security given, as shown by the affidavit of Mr. Brisbin, and the new note was given for more than there was due on the old note, which constitutes a good consideration for the accord and satisfaction in this case.

Furthermore, it is settled by repeated decisions in New York and other States, that a surety who gives his note for the debt of the principal, has so far paid it as to enable him to sue the principal and recover the amount. 10 *Wend.*, 500, 8 *John.*, 206; 1 *Wend.*, 430, 11 *John.*, 518 *and* 464; 7 *Cow.*, 668, 3 *Mass.*, 403; 6 *Cow.*, 301, 470. The case at bar falls within the same principle, for although the Plaintiff was liable to the creditors, yet as between the Plaintiff and Langley, the latter had made them his own debts, by assuming and promising to pay them.

V.—It is wholly immaterial whether or not the Plaintiff had paid the Dunwell and Cave note, or any of the other claims. The bond upon which the suit was based, was condi-

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tioned not only to indemnify the Plaintiff against those claims, but that Langley should pay them. If Langley did not pay the claims when they became due, or within a reasonable time, the bond was broken, and a right of action accrued at once to Plaintiff upon the bond, to recover the whole amount of the claims. 2 *Parson on Contracts*, 462 *and Notes;* 1 *Hill*, 145; 10 *Wend.*, 498; 17 *John.*, 239-479; 7 *Wend.*, 499; 8 *Wend.*, 452; 15 *Wend.*, 502; 3 *Denio*, 321; 21 *Conn.*, 117, is a strong case in point, covering the whole ground.

I understand from Mr. Ames that he will claim that the assumption of Plaintiff's debts, by Wm. B. Langley & Co., at the time the Partnership was formed, was an agreement within the statute of frauds, and not binding, it not being in writing, and that the bond to pay these debts, thus verbally assumed, cannot be enforced.

We should think it was too late to raise this question, after the bond is given. But however that may be, the agreement of W. B. Langley & Co. to assume those debts, was an original and not a collateral undertaking, and therefore not within the statute. 2 *Parsons on Contracts, p.* 300 *et seq., and Notes.*

Points and Authorities for Respondent.

I.—The referee erred in admitting and receiving in evidence the bill of sale from Patrick Keough to William B. Langley, dated February 9, 1858.

II.—Questions 4, 5, 7 and 8, and the answers thereto, of Patrick Keough's deposition, and all evidence of like character, were improperly received in evidence by said referee, for the reasons stated in the case.

The evidence thus received did not prove or tend to prove any material issue in the case, and was not competent for any purpose. The material issue made by the pleadings in this connection was whether at the time of forming the co-partnership, Langley agreed with Keough, that the new firm of William B. Langley & Co., (composed of Langley and Keough) should assume the individual debts of Keough, previously contracted. The evidence above referred to, not only

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threw no light on that question, but was calculated to prejudice the Defendant, who was an entire stranger to the transactions between Keough and Langley. The purpose of the testimony was to lay the foundation for an argument, that if Mr. Langley, in case he did not assume these debts, would have made a good trade or got the best end of the bargain, then, that he did actually assume them, a course of reasoning too forced and far-fetched to be sustained in law.

Besides, if the facts sought to be elicited by the above questions were material or competent in any view, the articles of co-partnership and the bill of sale already referred to, were the best evidence, and could not be controlled or varied by oral testimony. They are presumed to contain all that transpired between the parties at that time, upon the subject to which they relate.

III.—The question asked the witness William B. Langley, sworn on the part of the defence, whether he observed or knew that the word "assumed" was in any other part of the bond at the time it was signed, was clearly proper, and the referee erred in excluding it. See *folio* 125.

IV.—The order vacating the judgment, setting aside the report of the referee and granting a new trial, was properly made by the Court below, for the reason that the conclusions of law found by the referee are not sustained or supported by the facts found by him.

The referee finds the acts which were done; the mode and manner in which what he calls payment of the Cave and Dunwell note by the Plaintiff was made; viz: "by giving to the holder thereof his other note for the sum of eleven hundred and twenty dollars." That was no payment of the debt.

It is well settled that the giving of a note, either of the debtor or of a third person, for a pre-existing debt, is no payment unless it is expressly agreed to take the note as payment. *See Hughes vs. Wheeler*, 8 *Cow. R., p.* 76; *Monroe vs. Hoff*, 5 *Denio R., p.* 360; *Porter vs. Talcott*, 1 *Cowan R., p.* 380, 382; *Tobey vs. Barber*, 5 *Johns. R., p.* 72; *Raymond vs. Merchant*, 3 *Cowan's R., p.* 147; *Sheehy vs. Manderville*, 6 *Cranch R., p.* 253; *Bill vs. Porter*, 9 *Conn., p.* 23; *Benedict vs. Green*, 15 *Johns. R., p.* 247; *Wiseman vs. Lyman*, 9 *Mass. R.*, 290; 5 *Hill R., p.* 448.

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And in New York it is held, and is the settled doctrine of that State, that where the debtor gives *his own note* for a precedent simple contract demand, it will not operate as payment, so as to preclude the creditor from suing on the original consideration, though it be given *under an express agreement that it shall be received in full satisfaction and discharge. See Cole vs. Sackett*, 1 *Hill R., p.* 516; *Frisbie vs. McKinney*, 21 *Wend.*, 449.

V.—The order vacating the judgment setting aside the report of the referee and for a new trial was properly granted on account of the newly discovered evidence, as stated and shown in the affidavit of M. E. Ames.

This affidavit shows the discovery of the testimony given by Cave and Dunwell, upon the trial of Eddy, Fenner & Co. *vs.* Caldwell. It is new and vitally important evidence upon a material point in this case, to-wit: That the Plaintiff had never paid or settled the Cave and Dunwell note; upon that trial Dunwell swears so positively, and Cave at least inferentially.

And this cannot be disputed, because it appears in the case made and settled in that action that they did so testify. Indeed the Defendant never could have prevailed in that action, unless it had been shown that this seven hundred dollar note was unpaid; for the chattel mortgage, under which the Defendant justified in that action, would have fallen and become null if the note had been paid.

This is newly discovered evidence in the strict sense of the term, because the trial and final submission of this case before the referee took place in January last.

And the trial of the case of *Eddy, Fenner & Co. vs. Caldwell*, wherein Cave and Dunwell gave their evidence, was in May following, and was the first intimation the Defendant or his counsel had, as appears by the affidavit, that such evidence existed.

Want of diligence cannot be imputed to the Defendant in not producing this evidence on the trial before the referee.

The affidavit shows that neither he nor his counsel had any intimation of its existence; and the receipt of Cave and Dunwell, signed by their attorney, which was read in evidence

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on the part of the Plaintiff, was enough to deter the Defendant from looking to Cave and Dunwell for evidence to prove the defence on this point, and as the learned Judge who granted the motion for a new trial below suggests, "the Plaintiff was justified in supposing the receipt disclosed the true nature of the transaction, and it is not strange that he could not have foreseen that the testimony of "Cave and Dunwell would be of an opposite character."

That the evi lence which they gave on the trial of *Eddy, Fenner & Co. vs. Caldwell*, is material in this case to show that the debt to Cave and Dunwell had not been paid by the Plaintiff, cannot be successfully controverted, and requires no argument to establish: for the payment of the debt by the Plaintiff is the very ground upon which he seeks to recover in the action. *G. & W. on New Trials*, 1004, 1052, 1047, 1054, 1057.

VI.—The affidavits of John M. Gilman and John B. Brisbin, produced by the Plaintiff's counsel in opposition to the motion were incompetent, and ought not to be considered by the Court; because the object and purpose of these affidavits is to show that the new note of $1,120, given by the Plaintiff to Cave and Dunwell was given and received as a settlement and payment of the old debt.

That is a purely issuable fact, put in issue by the pleadings and for the jury to try; and cannot be determined by the Court upon affidavits.

The Defendant brings forward the newly discovered evidence, and the Plaintiff by these affidavits takes issue upon the truth of that evidence—and asks the Court to try the issue upon affidavits.

This cannot properly be done. It is for the jury or referee to determine the weight and strength of this newly discovered evidence, and try the issue of fact upon a new trial; and of this issue they are sole judges.

Smith & Gilman, Counsel for Appellant.

M. E. Ames, and Greenleaf Clark, Counsel for Respond't.

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By the Court.—EMMETT, C. J.—The District Judge, as appears from the opinion on file, based the order granting to the Defendant a new trial, solely on the ground of newly discovered evidence.

On the trial before the referee it became material to ascertain whether the Plaintiff had paid a certain note given by him to Cave and Dunwell. The Plaintiff swore that he had so paid, and introduced a receipt to that effect, signed by the attorney of said Cave and Dunwell. The referee found that the Plaintiff had paid said note, and he included the amount thereof in the judgment which he reported in favor of the Plaintiff.

Afterwards upon a motion for a new trial, the Defendant introduced the affidavit of Michael E. Ames, Esq., his attorney of record, from which it in substance appears that several months after the trial of this action, the said Cave and Dunwell were severally examined as witnessess in a certain other action, in which it also became material to ascertain whether the note aforesaid was still due and unpaid; and that upon said note being shown to said witnesses, they each testified that it had not been paid. The affidavit further states that affiant did not know that Cave and Dunwell had so testified, or would so testify, until long after the trial of this action, and that he was informed of what they had testified to, as above stated, by Colonel John B. Sanborn, incidentally in the course of a conversation had with him. That he is informed and believes that Cave and Dunwell will so testify, if a new trial is granted; and that he could not obtain their testimony on the trial before the referee, because he did not know the truth about the payment until long afterwards.

This affidavit is defective in many particulars. The Defendant should have produced the affidavits of Cave and Dunwell themselves, or shown some satisfactory reason for not doing so, instead of contenting himself with stating what he was informed they had or would swear to. It is not a sufficient answer to this objection that their testimony in the other case, being under the solemnities of an oath, and subject to cross examination, was as good or even better than an *ex parte*

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affidavit to the same effect, for we do not even know what they swore to in the other case, except through the medium of Colonel Sanborn, who makes no affidavit himself—who is not shown to have been present and heard the testimony, and who, for aught that appears to the contrary, may have got his information from hearsay merely. Such evidence is too remote to merit a moment's consideration.

But again, the Defendant does not sufficiently excuse his want of diligence in not producing Cave and Dunwell upon the trial. It is not enough that he did not know what they would swear to, and had reason to suppose that the receipt introduced in evidence disclosed the true nature of the transaction. The receipt and the evidence of the Plaintiff had been on file for months prior to the time of trial. The receipt was not signed by Cave or Dunwell in person, but by their attorney. They and their said attorney all resided where their testimony could easily have been obtained. It was easy for the Defendant to ascertain the exact nature of the transaction, and yet they were not called as witnesses, nor does it appear that any information has been sought from these sources even to this hour. We can tell from the affidavit neither what they have, nor what they would swear to.

But the Defendant insists, aside from the newly discovered evidence, that there is error in the record sufficient to warrant the order granting a new trial. He takes the position, and insisted on it throughout the trial, that the Plaintiff could not go outside the articles of co-partnership, to show that the firm agreed to assume the debts which the Plaintiff had contracted in the business prior to the formation of the partnership; and hence that all of the testimony of the Plaintiff as to the assumption of these debts, and all evidence as to who owned the stock at the time—how much was put in by each partner—its estimated value, and as to the firm having paid and provided for debts of this nature, was improperly admitted.

The main question at issue on the trial was whether the firm had assumed the debts contracted by the Plaintiff as alleged in the complaint—not whether they were so assumed by the articles of co-partnership. An examination of these partnership articles shows that they relate simply to the manner in

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which the business was to be conducted, how the profits were to be divided, and the losses borne, how long the co-partnership might continue, and how it might be dissolved. As to all these matters the articles are presumed to embrace the understanding and agreement of the partners, and could not therefore be varied or added to. But they are silent as to the stock to be employed; how it had been or might be obtained; how paid for, and the multifarious other matters which would necessarily arise in managing and conducting the business.

Parol evidence is admissible in cases of written instruments to prove collateral and independent facts, about which the writing is silent. *Phil. on Ev.*, 562-3, *and notes.* And we think that the agreement to assume the prior debts, created in conducting the business which the partnership was to continue, is a matter independent of the manner in which the business was to be conducted, the division of profits and losses, or the continuance or dissolution of the firm, and wholly collateral to the subjects embraced in these articles. That evidence tending to show such an agreement was properly admitted; and for this purpose not only was the positive testimony of the Plaintiff on that point receivable, but also the evidence of facts tending to confirm his testimony—such as that of his putting in the entire stock—its estimated value —what he was paid thereon and how—on what terms he withdrew, and the fact that the firm did pay and provide for paying debts of this kind. All these, though not conclusive of themselves, yet tended to sustain the Plaintiff's testimony, and when considered together seem inconsistent with any hypothesis other than that of an assumption of these debts on the part of the firm.

This holding, it is believed, covers all the material objections raised as to the evidence introduced by the Plaintiff.

The question asked of the witness Langley introduced by the Defendant, as to whether he had observed the word "assumed" in the bond given by himself and the Defendant, was an indirect attempt to vary the terms of the written instrument on which the action was brought, and was therefore properly excluded.

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Great confidence was also expressed in the point, that the facts found by the referee as to the payment of the note to Cave and Dunwell, by the Plaintiff, do not warrant the conclusion that the note was paid. The referee finds that the Plaintiff "paid and satisfied said note (the Cave and Dunwell) by giving to the holder thereof his other note for $1,120." The sum for which the new note was given, exceeded the amount found to be due on the old, by about $118, and to the extent of this excess there was a consideration for the payment, over and above the mere giving of a note for a precedent debt. There can be little doubt that parties may by express agreement make the giving of a note or bill of exchange for the amount of an existing debt, operate as a payment of such debt; and still less, that they may do so where a new and additional consideration passes from the debtor to the creditor. The only doubt heretofore has been, as to whether, without an express agreement to that effect, the mere giving of a note or bill for a precedent debt, extinguishes the debt; yet even in such cases, according to the note of the learned editors of the *American Leading Cases*, in which the various decisions are reviewed, "the weight of authority in England and in this country is decidedly in favor of the proposition that the new cause of action arising from the receipt of a promissory note or bill of exchange, for a precedent debt, is a sufficient consideration to sustain an accord and satisfaction, even where the parties are liable upon the new and old note." 2 *Amer. Leading Cases*, 181.

The order of the District Court setting aside the judgment and report of the referee, and granting a new trial, is reversed.

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RUGGLES, NOURSE, MASON & Co., Plaintiffs in Error, *vs.* SWANWICK & DUFFY, Defendants in Error.

ERROR TO THE DISTRICT COURT OF SCOTT COUNTY.

It may always be shown in defence to an action on a note in the hands of original parties, that it never was perfected by delivery, or that there was no consideration moving between the parties to support it.

When any contract between parties is reduced to writing, it must be proven by the writing, and cannot be varied by any previous or contemporaneous verbal agreements or understandings: but where there is a direct reference in the writing, to a verbal agreement, the latter may be proved even though the effect of it be to add material terms and conditions to the writing.

Where a writing evidently appears to express only some part of an agreement entered into between the parties, it seems it would be admissible to prove the other parts of the agreement on which it is silent.

Points and Authorities of Plaintiffs in Error.

I.—The Court below erred in admitting the parol testimony concerning the contracts and agreements, and the assignment mentioned in the answer, after the note (sued on) had been offered in evidence, and when the Plaintiffs offered to show that the other contracts were also reduced to writing. *Part* 2, *Cow. & Hill's Notes to Phil. on Ev., pages* 593-94-95, *and cases there cited.*

1st. For the reason that the same tended to vary the terms of the note which was already in evidence at the time of offering the parol testimony objected to. (*See testimony*) *Paper Book, folios* 47, 48, 66, 67, 85. By which testimony it was attempted to be made to appear that the instrument sued on as a note, was nothing but a mere memorandum; for which purpose the testimony was inadmissible. *See Chit. on Con., 9th Amer. Ed., pages* 110, 111, 105; *McComb, Simpson & Co. vs. Thompson*, 2 *Minn. R.*, 146.

2d. For the reason that said parol testimony tended to show an assignment of the book accounts therein mentioned to the Plaintiffs in payment of the note sued on, in palpable contradiction of the assignment itself, which appears upon its face

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to be an assignment to Thomas J. Galbraith. *See P. B., folios* 45-6-7, 50, 59; *see also assignment and agreement.*

3d. For the reason that said parol testimony was intended to, and did vary the terms of the written agreement of the parties to said assignment, concerning the distribution of the proceeds of the accounts assigned, in this: that it tended to create an agency on the part of Galbraith for the Plaintiffs, wholly unknown to either of the writings. Such testimony is incompetent to connect an agency with a person making a written contract as principal therein. It must appear by the contract itself in what capacity the parties thereto acted. *Story on Agency, pp.* 184-85-86, *and notes, with cases there cited, to-wit: Stackpole vs. Arnold,* 11 *Mass. R.*, 27, 29; *Bradlee vs. Boston Glass Manufactory,* 16 *Pick. R.*, 347, 350; *Alfridson vs. Ladd,* 12 *Mass. R.*, 173, 175; *Savage vs. Rice,* 9 *N. H. Rep.*, 263, 269, 270; *Rice vs. Gove,* 22 *Pick R.*, 158, 161; *Minard vs. Reed,* 7 *Wend. R.*, 68; *Pentz vs. Stanton,* 10 *Wend. R.*, 271; *Spencer vs. Field,* 10 *Wend. R.*, 87; 4 *Kernan R.*, 325-26; *also Story on Agency,* 190, 202, 203.

The errors here complained of could not be cured by the subsequent instructions of the Court, "that if the jury should find the written and parol testimony to conflict, that the written must prevail." *See* 2 *Gra. & Wat. on New Trials, p.* 612 *to* 617, *inclusive*—620 *to* 631, *inclusive*—633, 644, 645, *with intervening notes and cases there cited; see also, opinion of Flandrau, J., in Bond vs. Corbet,* 2 *Minn. R.*, 258.

II.—The Defendants were guilty of misconduct in suppressing the written agreement of the parties concerning the distribution of the said assigned property, until after they had offered, and caused to be admitted, parol testimony of its contents, and contradicting the same. (*See P. B., folios* 88, 89;) *Cow. & Hill's Notes to Phil. on Ev., part* 1, *pages* 435, 456; 1 *Gra. & Wat. on New Trials,* 55-6-7.

III.—The verdict was against the law and the evidence given on the trial.

1st. The verdict does not conform to the law, in this: that it is not responsive to the issues presented by the pleadings.

The issues formed and tendered by the answer are inconsistent with each other. Consequently the verdict should

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have been special and responsive to each, or to such of them as would have disposed of the action. *See* 3 *Gra. & Wat. on New Trials, pages* 1392-93-94, *and cases there cited.*

2d. The verdict was against all the legal evidence adduced in the case.

The testimony of Leonard, Sanborn and Duffy, in all the material parts thereof, was contradictory of, and in variance of the contracts and agreements of the parties thereto, as evidence by the writings themselves, and should have been wholly disregarded by the jury under the instructions of the Court. *Cow. & Hill's Notes, part* 2, *page* 398; *part* 1, 456.

Points and Authorities of Defendants in Error.

I.—The complaint having alleged the particular consideration of the note to be a "debt due the Plaintiffs in their partnership name and capacity" were bound to prove it, and in their attempt to prove it, having introduced in evidence part of the transaction in which the alleged consideration originated, and of which it consisted, it was for this reason alone competent for the Defendant to introduce in evidence the whole transaction, and the attendant circumstances. And the whole transaction having been given in evidence conclusively proves there was no consideration for the note, or delivery thereof to the Plaintiffs. 2 *Greenl. Ev., sec.* 173 ; *Benson vs. Couchman*, 1 *Code, R.* 119 ; *Hugh vs. Wheeler*, 8 *Cow.*, 77 ; *Bayly vs. Freeman*, 4 *John.*, 280 ; *Lansing vs. Kellip*, 3 *Cai.*, 286 ; *Sexton vs. Jackson*, 10 *John.*, 418.

II.—If the parol evidence is admissible for any purpose, it was properly received by the Court, and if not admissible for all purposes, the Plaintiffs should have required the Court to limit its application in charging the jury.

1. The parol evidence is admissible to show that the note never had any legal existence or binding force, either, first, for want of consideration, or, second, for want of due execution or delivery.

2. The parol evidence is admissible to show that the "debt due the Plaintiffs," for which the note is alleged to have been given, was satisfied, paid, and discharged. 1 *Greenl. Ev., secs.*

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283, 284, 527, 522, 302; 4 *Phil. Ev.*, 590, 592, 533, 617; 2 *Greenl. Ev.*, *sec.* 173; *Cow. and Hill's Notes*, 938, 1003; 4 *Phil. Ev.*, 578; 6 *Wend.*, 615; *Cow. and Hill's Notes*, 969, *to* 1 *Phil. Ev.*, 551; *Goddard vs. Cotes*, 2 *Farq.*, 442; *Devlin vs. Hill*, 2 *Farq.*, 434; 17 *Peters*, 161; *Clark vs. Goddard*, 10 *Wend.*, 310; 11 *do.*, 533; *Powers vs. Russell*, 13 *Pick.*, 69, 75, *and citations.*

III.—The issues raised by the Defendants' answer are all in substance denials ot allegations in the complaint (1) of any consideration, (2) of any delivery, with the transaction and circumstances showing how the note originated and got into the hands of the Plaintiffs; and (3) the complaint having made the negative allegation that the note "had not been paid," the answer makes the affirmative statement, as a defence, that the note was "fully paid, and discharged, and satisfied," at the very time of its inception, by the transaction which the Plaintiffs allege and attempt to prove to have been the consideration of the note; and no evidence was offered of any payment, discharge, or satisfaction of the note, other than such as goes to the consideration and delivery.

IV.—The rule that parol evidence cannot be received in evidence to contradict or vary the terms of a written contract, is limited in its application to the contract which is the subject of litigation, and does not apply to written evidence offered to support or defeat the written contract. *Cow. and Hill's N. to Phil. Ev.*, 1436-8.

V.—The jury having found a verdict "for the Defendants," such a verdict is a finding for the Defendant on all the material issues; although a finding either that there was no consideration for or delivery of the note, would be sufficient in a special verdict to entitle the Defendants to judgment; and a finding of a special verdict for the Defendants that the note was paid, and discharged, and satisfied, as alleged in the answer, would have been a sufficient finding to entitle the Defendants to judgment. *Comp. Stats.*, 561, *secs.* 34, 35; 1 *Ld. Ray*, 324; 3 *Salk.*, 372; 5 *Ohio*, 227; 9 *do.*, 131; 21 *Wend.*, 90, 19; 13 *do.*, 425; 6 *do.*, 272; 3 *do.*, 667; 9 *do.*, 650; *Arch. N. P.*, 283; 1 *Doug.*, 376; 2 *do.*, 730; 6 *T. R.*, 691; 5

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John., 435; 11 *John.*, 985; 1 *Bos. and Pul.*, 329; 1 *Arch. Pr.*, 219, *and citations.*

JOHN H. BROWN, Counsel for Plaintiffs in Error.

HENRY HINDS, Counsel for Defendants in Error.

By the Court—FLANDRAU, J.—The firm of Litchfield & Stombs sold a stock of goods to the Defendants, Swanwick & Duffy, for which the latter gave their promissory notes for $3,300. The firm of Jewet & Root, creditors of Litchfield & Stombs, considering the sale of the goods fraudulent, had them attached in the hands of Swanwick & Duffy, which created litigation, and embarrassed Swanwick & Duffy in their business of selling the goods, and caused them damage. The firms of Farrar & Follet, Callendar, Flint & Co., and the Plaintiffs, were also creditors of Litchfield & Stombs, and were desirous of having the attachment removed and the debts of Litchfield & Stombs compromised and settled. With this view, Litchfield & Stombs, the Defendants, and the creditors of Litchfield & Stombs, met in the town of Shakopee and made an arrangement in substance as follows: 1. Litchfield & Stombs turned over their assets to their creditors, consisting of the notes of Swanwick & Duffy, some other notes, and their book accounts. 2. The assets, it was discovered, would only pay a percentage of 76-100 upon the dollar of their debts. The three notes of Swanwick & Duffy to Litchfield and Stombs were delivered up and destroyed, and in lieu thereof Swanwick & Duffy made a note directly to Callendar, Flint & Co., for $2,192 78, the amount of their claim at 76 per cent.; and one to Farrar & Follet, of $1,047 15, the amount of their claim at the same rate, payable at a future day,—Ruggles, Nourse, Mason & Co., and Jewet & Root taking for their share of the assets an assignment of the book accounts and some small notes against customers of Litchfield & Stombs. 3. The Defendants having sustained damage by reason of the attachment, were to be allowed what the book accounts realized beyond a certain sum, and twelve per cent. discount on all sums collected on them before a certain day.

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4. The negotiations for this settlement had been pending for about a week before it was consummated. At one stage of the negotiations the defendants had, in expectation of the book accounts being assigned to them, made out two promissory notes, one to Jewet & Root for $966 47, and the other to the Plaintiffs, being the one in contest in this action; but the settlement took another turn, and the Plaintiffs and Jewett & Root took the book accounts as their portion, subject to the interest of the Defendants in the avails, as above stated; and these notes were never delivered, except that they were left with the agents of the Plaintiffs as memoranda, indicating the amounts that were to be paid out of the avails of the book accounts, to the Plaintiffs and Jewet & Root, and the discounts to be paid to the Defendants, &c., and were to be given up at their due dates, without payment. One of them was so given up, but the other was given to the attorney for the Plaintiffs, who commenced suit upon it.

The only writings connected with this settlement were two: 1. An assignment of the book accounts to Thomas J. Galbraith, written in the books, which recited that they were to be applied to the payment of the debts of Litchfield & Stombs, according to the conditions of a certain settlement heretofore made between the firm of Swanwick & Duffy, signed by Litchfield & Stombs, and consented to by Swanwick & Duffy.

The other writing is signed by Galbraith, in which he agrees to take the book accounts, &c., collect them, and appropriate the proceeds to the payment, first, of the note made by the Defendants to Jewett & Root for $966 45; second, the note in suit here made to the Plaintiffs. Galbraith accepts the book accounts, &c., at the value of $1,586 88, "which sum is allowed as a credit on the notes aforesaid in the order and in the amounts in which the same is collected, at the rate of twelve per cent. per annum discount on the time from which the money is received, until the due date of the notes." That after these notes are paid, the balance is to be appropriated to the note of the Defendant, given to Farrar & Follet for $1,047 15.

This paper is consented to by Swanwick & Duffy and Litchfield & Stombs.

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The Plaintiffs make a question on the authority of Galbraith, he having been appointed to represent the Plaintiffs by Mr. Brown, who was their attorney. But this question we think is settled by the act of the Plaintiffs in bringing suit upon the note left with him; they ratify his acts by so doing.

The Defendants set out in their answer all the facts above detailed, and were allowed to prove them under the objection that the settlement was reduced to writing. Both writings were afterwardss received in evidence, and the Court charged the jury that if the parol testimony conflicted with the written, the latter must govern.

The question is, whether the evidence offered by the Defendant to show that the notes were never in fact delivered, and that they had no consideration, was properly received.

It will be observed that the only liabilities of the Defendants were their debt to Litchfield & Stombs of $3,300, and that they claimed damages of their creditors, which reduced it still lower. That when it was discovered that the assets of Litchfield & Stombs would only pay 76 per cent. on their debts, the Defendants took up their three notes then outstanding, and gave new notes to two of the creditors, Callendar, Flint & Co., and Farrar & Follet, for the amount of their claims at 76 per cent., which both reached the sum of $3,239 93. This arrangement fully satisfied these two creditors, and at the same time amounted to within $60 07 of the sum the Defendants owed to Litchfield & Stombs. The other two creditors, Messrs. Jewet & Root and Ruggles, Nourse, Mason & Co, were then left to the book accounts for their pay, which they accepted. That part of the assets being worth, if all collected, $2,700, but being received at the estimated value of $1,586 88. The claims of these two last creditors at 76 per cent. amounted to $1,553 10, as follows: That of Jewet & Root to $960 45, and that of Ruggles, Nourse, Mason & Co. to $592 65. There was no reason why the Defendants should assume these debts. They had already assumed the full amount of their liabilities within $60 07. The Defendants had previously made out their notes for the several amounts due to these two firms, on the supposition that they were to take the book accounts and assume the debts.

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When, however, it was determined that the creditors should take the accounts themselves, in payment of their claims, and that the Defendants should be compensated for their damages, by receiving 12 per cent. discount on what should be collected before the claims of the creditors fell due, and all the surplus after they were paid, these notes, of course, were not delivered, but being for the exact amounts due each creditor, and also indicating the times when these demands fell due, they were allowed to remain with Mr. Galbraith as memoranda upon which to regulate the administration of the assets as they were converted into money.

It may always be shown in defence to an action on a note, in the hands of original parties, that it never was perfected by delivery, or that there was no consideration moving between the parties to support it. It is equally well settled, that when any contract between parties is reduced to writing, it must be proven by the writings, and cannot be varied by any previous or cotemporaneous verbal agreements or understandings.

The writings in this case do not pretend to record the whole transaction. They refer simply to that part of it which relates to the claims of Jewet & Root, Ruggles, Nourse, Mason & Co., and the damages of the Defendants from the attachment, and provide the means by which these claims were to be paid. The assignment in the books refers directly to the settlement of the parties out of which the assignment grew, and a part of which it is. The second paper, signed by Mr. Galbraith, is but part of the first. The one assigns, the other accepts the assignment, and provides for the disposition of the assigned property. They both form part of the whole transaction by which the estate of Litchfield & Stombs was distributed among their creditors, and cannot be resorted to intelligently for any purpose, without reference to the settlement which forms the basis upon which they were made. When the whole arrangement is placed before the Court it is quite easy to understand the meaning of the writings, and to give them their whole force and effect, at the same time allowing the truth to appear in relation to the origin and purpose of the note sued upon. The verbal testimony in no way contradicts or varies the writings; it simply furnishes the

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whole of the transaction of which the writings form a part and are dependent upon for their meaning and just application. It shows these pretended notes, referred to in the writing, never had either consideration or delivery to support them as claims against the Defendants; and also that the statement in the writing signed by Galbraith, in which he takes the books, notes, &c., at $1,586 88 was a payment and satisfaction, of the very debts for which these notes were originally drawn, at the time the Defendant proposed to assume the payment of them.

Where there is a direct reference in a writing to a verbal agreement, the latter may be proved, even though the effect of it be to add material terms and conditions to the writing. 2 *Cow. and Hills' Notes to Phil. Ev.*, 519 ; *Com'rs vs. McCalmont*, 3 *Pennsylvania R.*, 122 ; *Couch vs. Meeker*, 2 *Conn. R.*, 305. The assignment to, and acceptance by Galbraith, are as one instrument; they refer to the settlement made concerning the payment of the debts of Litchfield & Stombs, and are conditioned upon it. Such settlement may therefore be proved with the writings.

Again, "when a writing evidently appears to express only some part of an agreement entered into between the parties, it seems it would be admissible to prove the other parts of the agreement on which it is silent. 2 *Cow. and Hill's Notes to Phil. Ev.*, 598.

The Plaintiffs allege in their complaint that the note was given for a debt due to the Plaintiffs. In their proof they show that it was for a debt due them from Litchfield & Stombs, which was in judgment. The Defendants having denied any consideration, and alleged payment, might show that the debt of Litchfield & Stombs was paid by the acceptance of the book accounts at the value stated in the writings.

There was clearly no error in receiving the parol evidence, and the judgment is affirmed.

The form of the verdict is unexceptionable. *Comp. Stats.*, *p.* 561, *sec.* 35.

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MARTIN MOWER, Jr., *et als.*, Appellants, *vs.* HANFORD, THAYER & Co., *et als.*, Respondents.

APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY.

Upon an appeal from a judgment, the Court may review an order refusing a new trial, made upon motion and case settled.

If the case is not properly a part of the record in the Supreme Court, a motion should be made to strike the same from the record; not to dismiss the appeal. If the record improperly presents matters prejudicial to either party, it may be corrected on cause shown.

In an action by creditors to set aside certain deeds of conveyance by the debtors to a third party, upon the ground of fraud, the Plaintiffs offered in evidence a certain deed of assignment for the benefit of creditors, executed by the debtors on the date of the deeds, charged to be fraudulent, and also a judgment roll in an action in which certain other creditors of the assignor were Plaintiffs, and the said debtors and their assignee were Defendants, wherein a jury had found said deed of assignment was made with intent to defraud the creditors of said assignors. *Held* that this evidence was inadmissible for the purpose of evidencing the intent with which the deeds, sought to be set aside, were executed, the adjudication in the judgment roll being not only with reference to a different subject matter, but between different parties.

A clause in an assignment for the benefit of creditors, authorizing the assignee to sell upon credit, is held to avoid the assignment as a matter of law, although not inconsistent with an actual honest intention on the part of the assignor.

Insolvency, concealment of property, appropriating the same to the debtor's own use, and the like circumstances, may be relevant and material evidence to the issue of fraudulent intent, at the time of the execution of certain conveyances to third parties, contemporaneous with a general assignment of property for the benefit of creditors. So, the opposite of these conditions and acts, such as the application of the assignors' available means in discharge of their just debts for a considerable time previous and up to the very time of the conveyances complained of, may have a tendency to show good faith, and are proper circumstances for the jury to consider in forming their judgment of the intent of the transaction.

Where several deeds of conveyance to different parties, and a deed of assignment to another party, were in process of preparation at the same time, and executed upon the same day, there is no conclusion of law that the deeds were all one act, and part of the same transaction. It was a question of fact for the jury. And, where such conveyances were executed by two Defendants, who were co partners, and the Court charged the jury, that if they found that if either of the Defendants in making any one of the deeds, intended to hinder, delay or defraud the creditors of the firm, then all the deeds were void as to such creditors.—*Held* to be error.

In this action, (brought to set aside certain deeds as fraudulent,) the complaint prayed that the grantee in the deeds be adjudged a trustee of the value of the lands conveyed to him, as the same were at the date of the deeds, and to pay the amount of the same to such person as the Court might appoint. After verdict, and before judgment, and pending a stay of Plaintiffs' proceedings, they obtained an order for Defendants to show cause why certain logs alleged to have been cut by the grantee on these lands, the previous winter, should not be delivered to the Sheriff of the County of Washington, to be by him sold and converted into money, and the proceeds brought into Court, &c. Upon the hearing this order was made absolute. *Held*, that the grantee being treated in the complaint as trustee of the property, the Court could not, of its own motion, or upon the mere request of the Plaintiffs, have taken the property from the trustee and placed it in the hands of the Sheriff. If he had been appointed as trustee under the prayer in the complaint, he would have been entitled to receive the rents, issues and profits of the lands, or even to sell the same, holding the proceeds for the Plaintiffs' benefit. He would be subject however to the order of the Court, and might be removed or restrained for any abuse or improper exercise of the trust reposed in him, or when it is shown that the trust fund is likely to be misapplied or lost in his hands.

This is an action brought by Hanford, Thayer, & Co., and Berthold, Rozier & Co., judgment creditors of Burkleo and

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Mower, two of Appellants in this action, to set aside certain conveyances of real estate executed by Samuel Burkleo and wife and William H. Mower and wife—and by Samuel Burkleo and wife separately—and by William H. Mower and wife separately,—to Martin Mower, Jr., executed on the 12th and 13th November, 1857, a portion of which real estate is situate in the State of Wisconsin, and another portion situate in the State of Minnesota, on the ground of fraud between the grantors and grantee; and also a deed executed by Samuel Burkleo and wife to Defendant Parker. Burkleo & Mower and Martin Mower, Jr., appear and answer, and Theodore E. Parker does not answer.

The complaint in this action charges,

1. Partnership of Plaintiffs, Hanford, Thayer & Co.
2. Partnership of Berthold, Rozier & Co.
3. Partnership of Defendants Burkleo & Mower.
4. Indebtedness of Burkleo & Mower to Plaintiffs Hanford, Thayer & Co., on and prior to 13th November, 1857, in all amounting to sum of $20,000 and more, on account of demands contracted by Burkleo & Mower in the course of their partnership business.
5. Notice of such indebtedness to Defendants Martin Mower and Theodore E. Parker, before and on the 12th November, 1857.
6. That all the Defendants on 12th November, 1857, did combine and collude together with a view to protect the property of Burkleo & Mower from the payment of debts, and with intent to defraud Plaintiffs, did together wickedly and fraudulently contrive to place such property beyond reach of creditors.
7. That on 12th November, 1857, the said Samuel Burkleo and William H. Mower jointly, and the said Burkleo and Wm. H. Mower separately, did own certain real estate, situate a part in Wisconsin and a part in Minnesota.
8. That on the 12th and 13th November, 1857, the Defendants Samuel Burkleo and wife and William H. Mower and wife jointly, and the said Burkleo separately, and the said William H. Mower also separately, fraudulently and covenously made and executed under their hands and seals, ac-

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knowledged and delivered to the Defendant Martin Mower, nine certain deeds conveying said lands, a portion of said deeds conveying lands in the State of Wisconsin only, and a part lands situated in Minnesota, and thereby conveyed said lands to Defendant Martin Mower, Jr. That said lands were of the aggregate value of $12.468.

9. That said deeds and each of them were not founded on a valuable consideration; and before and on 12th November, 1857, Defendant Martin Mower had notice of the fraudulent intent of said Burkleo & Mower, and received the same to aid and assist said Burkleo & Mower in hindering and delaying their creditors, &c.

10. That on or about 13th November, 1857, concurrently with the making said deeds, and as part of same transaction and with like intent, said Burkleo & Mower conveyed away, covered up and placed beyond the reach of execution all other, their and each of their leviable real and personal property, by deeds of conveyance, mortgage deeds, deeds of assignment, bills of sale, and other conveyances by them fraudulently and covenously made.

11. That Defendants have resided in the County of Washington since 1st May, 1854.

12. That Plaintiffs Hanford, Thayer & Co., on 13th November, 1857, were creditors of Defendants Burkleo & Mower, in about $2,000, then and yet due.

13. That on the 19th February, 1858, the said Hanford, Thayer & Co. commenced an aetion in the District Court for Washington county against Burkleo & Mower to recover said indebtedness.

14. That on the 4th May, 1858, a judgment was rendered and docketed in said Court in said County, for $2,138.89, damages and costs.

15. That on 29th May, 1858, an execution was issued upon said judgment to the Sheriff of said county and delivered to him and returned by said Sheriff on 24th July, 1858, no property found.

16. That on 4th September, 1858, said judgment was docketed in Chisago county.

17. That before and on 12th November, 1857, Tillman, Ro-

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zier & Co., were, and until January, 1858, continued to be creditors of Burkleo & Mower in the sum of $4,000, then and yet due. That in said January, 1858, the said debts and indebtedness were transferred by said firm of Tillman, Rozier & Co., for value, to the Plaintiffs Berthold, Rozier & Co., so that on or about the month of January, 1858, said Berthold, Rozier & Co. were, and since have been creditors of Burkleo & Mower, in sum of $4,000, then and yet due.

18. That on 7th July, 1858, said Berthold, Rozier & Co. commenced an action in the District Court of Washington county, to recover upon said indebtedness, and judgment was rendered against Burkleo & Mower, and docketed in said county on the 14th August, 1858, for $4,243.18.

19. An execution was issued thereon to Sheriff of Washington county, and delivered on 9th September, 1859, and returned no goods, 11th November, 1859.

20. That said judgments have not been paid and Defendants Burkleo & Mower have not, since 4th May, 1858, had any property out of which any part thereof could be made and unless Plaintiffs can get the lands embraced in the deeds, they will lose their said debts.

21. And Plaintiffs demand relief, that the deeds to Martin Mower of lands situate in Wisconsin be adjudged fraudulent as against Plaintiffs, that Martin Mower be adjudged a trustee for said creditors to the value of said lands, and pay the amount thereof to a receiver, &c.

22. That the deeds to Mower of lands in Minnesota be declared fraudulent, and Defendant be required to convey to receiver &c., and for injunction, and for a receiver, &c.

The Defendants Burkleo & Mower answer separately and deny each and every allegation.

The Defendant Martin Mower answers separately, and denies each and every allegation except the ownership of lands, and that conveyances were executed to him at the days charged, of the lands described in the complaint, and avers, that said conveyances were executed in good faith and without notice of any fraud or fraudulent intent on part of grantors, and were founded upon a good and sufficient consideration, which is specifically set out.

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Upon which issue was made by reply, and on trial verdict and judgment rendered for Plaintiffs.

Points and Authorities of Respondents.

I.—The Defendants having moved in the Court below for a new trial, they cannot now have the same matters determined here on an appeal from the judgment. The Defendants should elect between the appeal from the judgment, and the appeal from the order denying a new trial. And so far as the appeal is from the judgment it should be dismissed.

II.—The order dated May 25th, requiring certain pine saw logs to be delivered to the Sheriff of Washington county, is not an appealable order; as to *it*, this Court has no jurisdiction, and the appeal as to that order should be dismissed.

III.—The grievance complained of by the Plaintiffs is a conspiracy and combination by the Defendants to defraud the Plaintiffs, and a conveyance to the Defendants Parker and M. Mower, by the judgment debtors Burkleo & Mower, of all their joint and several real property in pursuance of the common object and purpose to defraud.

IV.—The particular relief sought in this action is to have adjudged fraudulent *ten separate* deeds made in execution of the common purpose; and these deeds, though some of them are joint and others séveral, are all to the same grantee, M. Mower, except one to Parker, and are each parcel of one act in which all participated; a disposition by the judgment debtors of all their property to defraud their creditors.

The gravamen of the action is the fraud, the fraudulent disposition of the property of the judgment debtors, in which fraud all the Defendants participated. It was in reality one act in which there were many actors. *Story's Eq. Pleadings, sec.* 285 *a and* 286, *and* 530 *to* 541.

V.—The deeds, though separate, being each executed in furtherance of the common design, stand no better than if all the conveyances had been made by a single instrument; and if the combination and intent to defraud is found, then the deeds must all fall together.

VI.—Evidence of the conspiracy having been given upon

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the trial, the individual act of either conspirator while engaged in the common object, was evidence against all of the co-conspirators.

VII.—The Defendant Parker appeared but did not answer; The Defendants Burkleo and Mower put in for answer a general denial. The Defendant M. Mower, Jr., denies the combination, and the fraudulent intent of the grantors, and pleads that the conveyances to him were founded upon a sufficient consideration. The Defendant M. Mower, Jr., is *not* upon the record claiming as a purchaser for value, either without or with notice of the fraud intended.

VIII.—The Defendant M. Mower, Jr., not being or claiming to be a purchaser for value without notice, neither his innocence or want of notice could make any difference; they were each wholly immaterial. The *intent* with which the conveyances were made was the only material enquiry.

A creditor who takes from his debtor a conveyance of property in payment of his debt, is not a purchaser for a valuable consideration within the meaning of the statute. *Willard's Equity*, 250, *et seq.*

IX.—The large joint indebtedness shown of Burkleo & Mower, and their joint and separate deeds to the same grantee, were sufficient evidence of a joint and common purpose to warrant the Court in admitting testimony of concurrent acts of either of the grantors in evidence of the common purpose. 1 *Am. Lead. Cas.*, 41; *Walcott vs. Alung*, 6 *McLean*, 23.

X.—The Defendants being properly sued jointly, and it being one trial against all the Defendants appearing, and all the deeds being defended, whatever was proper evidence as to either of the deeds or as to either of the Defendants answering, was admissible, and if any such testimony was not good against one Defendant, such Defendant must relieve himself from it by way of charge to the jury; the evidence could not be excluded. *Black vs. Foster et al.*, 28 *Barb.*, 387; *Palmer vs. Severance*, 9 *Ala.*, 751; *Falkner vs. Leith*, 15 *Ala.*, 9.

XI.—The deed from Burkleo and wife to Register was a concurrent act of the Defendant Burkleo, and was evidence of the intent with which he was acting; the title to the prem-

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ises embraced in this deed was not in controversy; the deeds show the *mind* of the grantor; the *actual* ownership of the premises was immaterial. *Black vs. White*, 13 *N. H.*, 267.

XII.—The judgment roll wherein the deed of assignment was adjudged fraudulent, was properly admitted in evidence; the proceeding in that action was *in rem.*, and the adjudication was upon the deed, and whether the judgment was conclusive or not, it was some evidence, and evidence against some of the Defendants. The deed of assignment was certainly admissible and was already in evidence, and whether the roll was admissible or not, the deed was *conclusively fraudulent* and void upon its face; and so the Defendants were not and could not in any event be hurt by the admission of the roll. *Lord vs. Chadbourne*, 42 *Maine*, 429; *Woodruff vs. Taylor*, 20 *Vt.*, 65.

XIII.—It was entirely competent for the Plaintiffs upon the trial to show in evidence of the intent, that concurrently with the execution of the deeds, the judgment debtors otherwise conveyed all other their property.

XIV.—The bill of sale from Mower, Elliot & Co. to Register, shows the *mind* of the parties; it shows the estimated quantity and an agreed price; the *actual* quantity, situation, or value, afterward ascertained or existing at the time, was entirely immaterial.

XV.—The fact that several days prior to the making of the deeds, Burkleo & Mower had settled with one of their creditors, and had paid some of their debts, could not tend to show that by the execution of these deeds they did not intend to defraud those whom they still owed.

XVI.—The Court below did *not* err in charging the jury. The charge was predicated upon the particular facts and circumstances of the case.

XVII.—In nothing was there error against the Defendants or any of them either at the trial, in the judgment or in the order of May 25th, requiring the delivery of property to Sheriff.

L. E. Thompson, and J. B. Brisbin, Counsel for Appellants.

D. Cooper, and W. H. Burt, Counsel for Respondents.

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By the Court—ATWATER, J.—The counsel for the Respondents contends that this Court has no jurisdiction as to the order of May 25th, directing the delivery of certain personal property, and the order refusing a new trial, on the ground that the appeals from those orders are not in time. In the view taken of the appeal from the judgment, it is unnecessary to decide whether those orders fall within the *25th section*, *Comp. Stats., p.* 673.

It is further contended that on appeal from the judgment, this Court cannot review the order refusing a new trial. The motion for a new trial was heard on a case settled, and which is sent up as a part of the record from the Court below. *Sec.* 7 *of chap.* 71, *p.* 621 *Comp. Stats.* provides that, "upon an appeal from a judgment, the Court may review any intermediate order, involving the merits, and necessarily affecting the judgment." The Defendant, it is true, might have appealed from the order refusing a new trial, before entry of judgment. But we do not think that he is compelled to this directly, in order to have that order reviewed. I think the order falls within the definition of those reviewable by *sec.* 7, above cited, and if the record in this Court presents all the facts, so that this Court can determine whether the Judge below erred in his rulings, I see no objection to examining the question on an appeal from the judgment. If the case is not properly a part of the record, the motion should be to strike the same from the record, and not to dismiss the appeal. This Court, on appeal from the judgment, will examine the errors as shown by the record, and if the same improperly presents matters prejudicial to either party, it may be corrected on cause shown. We do not mean to state, however, that such motion would have been proper in this case. The case appears to have been duly settled and filed, and no objection is made that it is in any respect incorrect in point of fact, and if there has been an irregularity in filing it with the judgment roll, it is rather an error in form than substance.

The order of the 25th of May, we think, may also be reviewed on the appeal from the judgment, as it involves the merits, (*St. John vs. West*, 4 *How.*, 332,) and also affects the

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judgment, since the proceeds of the logs constitute a prrt of the judgment debt, and are to be paid over to the Plaintiffs as creditors of the Defendants (*Jaques vs. Meth. Ep. Church*, 17 *John.*, 559.)

The trial of the case was lengthy, and a great number of exceptions are presented by the case, which disclose several errors in the ruling of the Judge who tried the cause. It is deemed unnecessary to examine them in detail, but only some three or four of those deemed most material.

The deeds executed by the Defendants, which this action is brought to avoid on the ground of fraud, were made November 13th, 1857. Upon the trial of the cause, the Plaintiffs offered in evidence a record of a deed of general assignment from Samuel Burkleo and William H. Mower, to Samuel M. Register, dated November 13th, 1857, conveying certain personal property to Register in trust, for the payment of their debts. This was received under objection. The Plaintiffs then offered in evidence a judgment roll or record of the District Court, in an action wherein Whitney, Fenno & Co., judgment creditors of Burkleo & Mower, are Plaintiffs, and against Samuel Burkleo and William H. Mower, partners, as Burkleo & Mower and Samuel M. Register, Defendants, dated July 28th, 1859, wherein a jury found said deed of assignment was made with intent to defraud the creditors of Burkleo & Mower. This testimony was offered for the purpose, as stated by Plaintiff's counsel, of evidencing the intent with which the deeds specified in the complaint were executed. This evidence was received under objection.

This evidence was clearly inadmissible. The adjudication in that suit was not only with reference to different subject matter, but between different parties. 4 *Cow. and Hill on Phil. Ev., p.* 2, *and cases cited.* I am not aware that this Court has held that an assignment in form, such as was offered in evidence, is void upon its face, and even were such the case, it would not necessarily show a fraudulent intent in fact, although held fraudulent in law. A clause in an assignment authorizing the assignee to sell upon credit, is held to avoid the assignment as a matter of law, although not inconsistent with an actual honest intention on the part of the assignor.

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If this evidence was admissible at all, it was conclusive against the Defendants, and in any event, taken in connection with the charge, must have been prejudicial to the Defendants.

The Plaintiffs also offered in evidence a bill of sale of certain logs, dated 12th November, 1857, executed by Mower, Elliott & Co. to Samuel M. Register, which was received under objection. The object of this testimony does not clearly appear from the offer, but we are led to infer it was also offered as evidence of the fraudulent intent of the Defendants, in which case we think it was improperly received.

The Plaintiffs, in establishing their case, introduced evidence showing a large indebtedness of the Defendants at the time of executing the deeds mentioned in the complaint, and proving, or tending to prove, their insolvency at that time. The Defendants, on their part, offered to show that, down to the very eve of the transactions complained of, the firm of Burkleo & Mower were paying off and discharging the indebtedness existing, and that within two months anterior to that date, they had paid off debts to the amount of $15,000, and that said payments were made from day to day during the period mentioned, and as fast as moneys could be realized from the assets and sale of the property. This and other evidence to the same end, was rejected by the Court.

Insolvency, concealment of property, appropriating the same to the debtor's own use, and the like circumstances, may be relevant and material evidence to the issue of fraudulent intent, at the time of the execution of these conveyances. So the opposite of these conditions and acts may have some tendency to show good faith in the debtor. If the Defendants could show that they were applying their available means in discharge of their just liabilities, for a considerable time previous and up to the very time of the conveyances complained of, it would be a circumstance entirely proper for the jury to consider, in forming their judgment of the intent of the transaction. Upon an issue of this kind, it is usually by circumstantial evidence only that the guilt or innocence of a party is established. A party contemplating or having committed a fraudulent act, does not usually acknowledge the fact in

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words, nor is he allowed to exculpate himself, by testifying that he did not intend fraud. The Plaintiffs adduce such circumstances as they may be able, from which they ask the jury to infer fraud. The Defendant, on the other hand, should be permitted to rebut these circumstances by proving the opposite, or a state of facts inconsistent with a fraudulent intent. Such evidence certainly would not be conclusive, as a debtor might act honestly toward one creditor or set of creditors, and fraudulently towards another; but it is evidence fit in itself for a jury to consider, and the Court erred in holding it entirely irrelevant and immaterial.

The Court charged the jury, among other things, "that if the jury find from the evidence that any one of the several deeds specified in the complaint was made with the intent to hinder, delay, or defraud the creditors of Defendants Burkleo & Mower, then the whole are void as to such creditors, if one transaction." To which Defendants excepted.

This charge, standing alone, as an abstract proposition, might, perhaps, not be objectionable, though considered with reference to the evidence admitted on the deed of assignment, and the ruling of the Court on that deed, virtually left but one point for the jury to decide, to wit: whether the making of the deeds was one transaction. But the Court proceeded further to charge, "that if the jury find that the several deeds of conveyance, specified in the complaint, and the deed of assignment in evidence, were in process of preparation at the same time, and executed upon the same day, that then the whole constitute but one act, and are part and parcel of the same transaction."

The deeds included within the terms of this charge were eleven in number, and to three different parties as grantees, some from Burkleo & Mower, jointly, as grantors, and some from them severally. The proof showed them to have been executed or acknowledged upon the same day, November 13th, 1857.

We think the Judge was clearly in error, in the charge last above quoted. There is no conclusion of law from the facts above stated, that the deeds were all one act, and part of the same transaction. That was a question of fact solely for the

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jury, and it was error for the Court to take it from their consideration. It certainly is not impossible that an individual should not only execute upon the same day, but be preparing at the same time a conveyance for the purpose of defrauding his creditors, and another for the purpose of securing an honest debt. In such case, the two acts could not properly be said to be of "the same transaction," the object and end of the one being entirely different from the other. However strong the probabilities may be in favor of the view entertained by the Court, the jury must be the only judges of the fact, and save for the ruling of the Court, they might have found one or more of the deeds not fraudulent.

The Court further charged, "that if the jury find from the evidence, that if either Samuel Burkleo or William H. Mower, in making any one of the deeds specified in the complaint, intended to hinder, delay or defraud the creditors of the Defendants, Burkleo & Mower, then all the deeds are void as to such creditors." This charge, standing as it does, as an abstract proposition, is also erroneous. It was in substance telling the jury that if they found that one of the Defendants executed a deed with fraudulent intent, that the law conclusively presumed that the other Defendant executed those made by him with the like intent. There is no such presumption in law, and the charge was calculated to mislead the jury. And the effect of the whole charge was to take the main question litigated, that of fraudulent intent, from the consideration of the jury, to whom it solely belonged.

The complaint prayed that Martin Mower be adjudged a trustee of the value of lands conveyed to him, which were situated in the State of Wisconsin, as the same were at the date of the conveyances, and to pay the amount of the same to such person as the Court might appoint, &c. Upon the 19th of April, 1861, after verdict and before judgment, and pending a stay of Plaintiffs' proceedings, the Plaintiffs obtained an order for the Defendants to show cause why certain saw-logs, alleged to have been cut by Martin Mower on the Wisconsin lands, the previous winter, and then being in the State of Wisconsin, should not be delivered to the sheriff of the county of Washington, to be by such officer sold and con-

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verted into money, and the proceeds brought into Court, to abide the event of the action, &c. Upon the hearing of the same the order was made absolute, and it was ordered that the timber be delivered into the custody of the Court, and be disposed of under the order of the Court, and the proceeds brought into Court to abide the event of the action.

At the time this order was made the title of the lands was in the Defendant, Martin Mower, and indeed, it does not appear from the complaint that it was sought to divest him of the legal title, by the judgment of the Court, but that he should hold the same as trustee for the Plaintiffs. Had the judgment of the Court been pronounced in accordance with the prayer of the complaint, Mower would have been declared trustee, for the purposes named in the complaint. Had he occupied such position, and been duly appointed trustee, (and this view of the case is most favorable to the Plaintiffs,) it will not be contended that the Court could, of its own motion, without due cause shown, or upon the mere request of the Plaintiffs, have taken the property from the trustee and placed it in the hands of the sheriff. The Defendants have an interest in the appointment of the trustee, and in the manner of the discharge of his duties, and he does not act as the agent of the Plaintiffs only. Mower, appointed as trustee under the prayer of the complaint, would have held not only the legal title of the lands, but would have been entitled to receive the rents, issues and profits of the same, or even to sell the same, holding the proceeds for the benefit of the Plaintiffs. He is, of course, subject to the order of the Court, and may be removed or restrained for any abuse or improper exercise of the trust reposed in him, or when it is shown that the trust fund is likely to be misapplied or lost in his hands.

We think the affidavits on which the order was made entirely fail to show any abuse or improper use of the power of the proposed trustee, or any legal evidence that the trust fund was in danger in his hands. It appears from the affidavits that Martin Mower had cut, during the previous winter, a considerable quantity of logs from the lands conveyed to him, and claimed by Plaintiffs, but as it would seem that he was not deprived of the power to receive the avails of the land, he

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would not be transcending his right in so doing; and as the complaint asked that he might be adjudged to pay the value of these lands as they were in 1857, to the Plaintiffs, for aught that appears to the contrary, he might be pursuing the very course to enable him to comply with such order. No charge is made that he was acting in fraud of the Plaintiffs' rights, or that he was proposing to remove the property beyond the reach of the Court, or convert the same to his own use. The property was in fact at the time without the jurisdiction of the Court, to wit, in the State of Wisconsin, while the affidavits show that "the logs are now in Apple river, in said county of Polk, and being driven and running into the river and lake St. Croix, in said county of Washington." There is no allegation whatever that the Defendant was about to sell or dispose of the same; and so far as appears from the affidavits the Defendant was engaged only in removing property to within the jurisdiction of the Court, over which before it had no control. So far as the acts of the Defendant, therefore, are concerned, I do not think the affidavits disclose any facts justifying the interference of the Court.

With reference to the insecurity of the property in the Defendant's hands, the affidavits are equally defective. All that appears on that subject is contained in the affidavit of W. H. Burt, Esq., and is in the following language, viz: "And that deponent knows much of the pecuniary circumstances of the said Mower, and that in the judgment of this deponent the said Mower is not of such pecuniary condition as to leave secure the rights and interests of the Plaintiffs in said action, if the said Mower is permitted to keep, remove, and convert to his own use the said timber." It is not stated or claimed that Mower was insolvent, or approaching insolvency, or that he had incurred any liabilities whatever, nor that he was of limited means. He might, for aught that appears, have been worth a hundred thousand dollars, clear of incumbrance, within the jurisdiction of the Court, and the affidavit have been true, since the deponent only states that, in his judgment, the Defendant was not of such pecuniary condition as to leave the interests of the Plaintiffs secure. It will scarcely be contended, that such an opinion was any legal

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evidence,—the statement of any facts authorizing the Court to interfere. To take property from the possession of a party legally entitled thereto, in such a summary manner, would lead to the most dangerous consequences.

The order was also erroneous, in ordering the property to be sold, without any facts whatever appearing indicating the propriety or necessity therefor. Facts may indeed have existed, (if it be admitted that the Court was justified in transfering the possession of the property) why the same should be immediately sold and converted into money, but the Court cannot take judicial notice of them, and they not appearing in any manner from the record, the property should have been retained to abide the event of the suit.

This view of the case renders it unnecessary to examine the jurisdictional question, as to the power of the Court to order the transfer of personal property, not within the State. The order being erroneous on other grounds, should be reversed.

We think the judgment below should be reversed and a new trial granted.

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HENRY A. SWIFT, Appellant, *vs.* LORIN FLETCHER, Respondent.

APPEAL FROM THE DISTRICT COURT OF NICOLLET COUNTY.

Under *Sec.* 51, *page* 537, *Stats. of Minn*, a Defendant has the same time to answer a complaint after it is served upon him, that he had of unexpired time when he served notice of appearance.

Where the Defendant pleads in time, the Court has no discretion on the question of opening up a judgment entered against him by default. A motion for this purpose is not an appeal to the favor of the Court, but an application for the enforcement of a right; and a denial of it may be reviewed in this Court. Where the answer is not in time, a motion for leave to plead is addressed to the discretion and favor of the Court, and not appealable, unless such discretion is abused.

The counter claim contemplated by the Statute (*page* 541. *sec.* 71. *Id. p.* 554. *sec.* 170,) must be one upon which an action can be maintained by the Defendant at law or in equity.

The act of March 8, 1860, (*Sess. Laws of* 1860, *page* 216,) was designed to compel parties whose demands were secured in the manner stated in the act, to proceed first to exhaust their securities, before bringing suit upon the original claim. The assertion of this power by the Legislature is not unconstitutional, But the second section of the act, so far as it permits an election with the creditor whether he will sue or not, is in conflict with the first section, and also with the spirit of the act; and so far as it provides for the release and discharge of securities as a consequence of bringing suit, it is in conflict with the Constitution of the United States, and of this State.

An endorser of a secured note may, under the above act, compel the holder to exhaust the security before resorting to him.

Points and Authorities for Appellant.

I.—The District Court erred in refusing to set aside the judgment entered on pretence of failure to answer, because the Defendant's answer was lawfully served in time. Facts: Summons served Octobor 4, 1860; notice of retainer served by mail, October 8, 1860; copy of complaint served personally on Defendant's attorneys, October 15, 1860; copy of answer served by mail, October 29, 1860; judgment on failure to answer, November 5, 1860, without notice. Authorities: *Comp. Stat.*, 537, *ch.* 60, *sec.* (51) XLVII; *ib.*, 628, *ch.* 72, *sec.* 26; *ib.* 555, *ch.* 60, *sec.* (173), *subdivision* 1; *Graham's Prac.*, 513, 520-21; 8 *Cow. Rep.*, 132; *Abbott's Plead.*, 138, *note* (*r*); 1 *Duer Rep.*, 601; 4 *ib.*, 45; 3 *Abb. Pr. R.*, 253; 4 *Sand., R.*, 696; 8 *How. Pr. R.*, 51; 5 *ib.*, 5.

II.—The District Court erred in overruling the Defendant's motion for judgment in his favor on the pleadings. Because,

1. The facts stated in the answer and admitted in the reply,

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show that another prior action for the same cause between the same parties, is pending in the District Court in and for the county of Nicollet in the Sixth Judicial District of this State, and that the Plaintiff's attempt to dismiss said prior action, is void. *Comp. Stat.*, 554, *ch.* 60, *sec.* (173), *subdivision* 1; *Act of March* 5, 1853, *secs.* 5 *and* 6, *contained in Compiled Stat.*, 480, *&c.*, *ch.* 57; *Gates vs. Smith*, 2 *Minn. Rep.*, 30.

2. The Plaintiff prosecutes the Defendant as endorser of a promissory note. The answer shows and the reply admits that the payment of the note was secured by mortgage executed by the maker of the note and his wife to Plaintiff. The bringing of this action operates to release and discharge the mortgage security. *Ch.* 48, *p.* 216, *of the Laws of* 1860; 3 *Denio R.*, 274. The Defendant was, as endorser or surety for the maker of the note, entitled to the benefit of that security, and any release of that by the act of the Plaintiff, releases the Defendant from his liability as endorser or surety for the payment of the debt. *Pitnam on Prin. & Surety*, 175, 113, 203, 204; *Theobald on Prin. & Surety*, 125, 127, 186, 188, 95; 4 *Coms. R.*, 352, 312; 5 *Wend. R.*, 85; 10 *John. R.*, 525; 1 *Coms. Rep.*, 595; 2 *Coms. R.*, 352; 3 *Minn. R.*, 1; 1 *Story's Eq. Jur.*, *sec.* 327; *Coote on Mort.*, 481-82; 8 *Sergt. & Rawle*, 452; 13 *Sergt. & Rawle*; 157; 1 *Penn. R.*, 129, 240; 4 *John. Ch. R.*, 129; 8 *Pick. R.*, 122; 4 *Ves.*, 824; 1 *Nott & McCord R.*, 116; 5 *Hill R.*, 634; *Ross on Bills*, (*note*) 586, 592; *Broom on Com. Law.*, 451; *Smith's Mercantile Law*, 300, (*Hol. & Ghol. Ev.*)

III.—A motion was made by Defendant that all further proceedings on the part of the Plaintiff be stayed or enjoined until he had resorted to and exhausted the mortgage security made to him by the maker of the note. The Court has omitted to decide that motion, and pending it, the Plaintiff has been permitted to proceed to execution on his judgment. This is error.

Points and Authorities for Respondent.

I.—The order of December 26, 1860, opening the judgment of November 5, 1860, so far as to allow the Defendants

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to answer, but preserving its lien until the further order of the Court, was correct, because, first, that judgment was regularly entered upon proper notice. The time for answering had expired. Where the complaint is not served with the summons, the Defendant has only twenty days from the service of the summons in which to answer, except where, upon demand, the complaint is served so late that a less period than ten days of the original twenty remains, in which latter case the party has ten days from such service in which to prepare and serve his answer. By no other construction can any effect be given to that clause of the statute that provides that the "Defendant shall have at least ten days thereafter to answer." In construing a statute, effect, if possible, must be given to all of its provisions. *Comp. Stats.*, 537, *ch.* 60, *sec.* (51), XLVII; *Smith's Commentaries, p.* 633, *sec.* 488, *et seq.; ib., p.* 647, *sec.* 502.

2d, The order does not involve the merits nor affect the judgment appealed from, but was one resting in the discretion of the Court, and is not reviewable. *Comp. Stat., ch.* 71, *sec.* (7) VII, *p.* 621; *Gale vs. Vernon*, 4 *Sand.*, 790; *Seely vs. Chittendon*, 10 *Barb. R.*, 303; *Tallman vs. Heinman*, 10 *Howard's Practice*, 89.

II.—The Defendant's motion for judgment upon the pleadings was properly denied.

1. The facts admitted by the pleadings do not show the pendency of a former action. The same was properly discontinued and dismissed. *Comp. Stats.*, 554, *ch.* 60, *sec.* (170), *subdivisions* 1 *and* 5.

The Plaintiff had the right without consent of Defendant to dismiss such former suit, no provisional remedy having been allowed and no counter claim having been made. The facts stated do not constitute a counter claim within the meaning of the statute. *Comp. Stats., p.* 541, *chap.* 60, *sec.* (71), *subdivisions* 1 *and* 2.

The counter claim which would prevent a Plaintiff from dismissing his action, must be such an one as would sustain an action on behalf of the Defendant against the Plaintiff, if the Plaintiff had not sued the Defendant, or such as would form the proper subject of a cross bill in equity. It must

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show not merely that the Defendant has a good defence, but that he is entitled to some affirmative relief. 2 *Duer*, 642; 22 *Barb. S. C. R.*, 335; 3 *Kernan*, 252; 13 *How. Pr.*, 248; 10 *How. Pr.*, 72; *Voorhies' Code*, *5th Ed.*, *p.* 172, *cases cited in notes under head of counter claim.*

(*a.*) The facts set up in the answer to the complaint in the former suit, presented no case for the interposition of the equity powers of the Court. If they furnished a defence at all (which is denied) it was one of which the party could have availed himself at law, and an equity court, under the old system, never interfered when an adequate remedy existed at law. *Gates vs. Smith*, 2 *Minn. R.*, 30.

2. The provisions of the "Act relating to mortgages and other securities," passed March 8, 1860, (*Sess. Laws* 1860, *ch.* XLVIII, *p.* 216,) have no application to the case at bar. That act only requires the holder of a mortgage, &c., to foreclose it, before suing upon the note, bond or contract for which the mortgage is security, under the penalty of forfeiting the security. The action in this case is founded not upon the contract for which the mortgage is security, but upon the contract of endorsement made by Swift, and the mortgage was not given to secure the performance of this latter contract.

Statutes of this character should be construed strictly and not be extended to cases not necessarily embraced within their provisions.

3. If the act in question, by its terms, necessarily reaches cases like the one at bar, then it is void as affecting and impairing the obligation of contracts. It engrafts upon the endorser's contract a new condition, and one unknown to it at the time it was made, viz: That he would not pay the note unless, and until, the holder of the note exhausted all the other securities of the nature referred to in this act, which he might hold against the maker, whatever might be the character of those securities or the solvency of the maker.

4. It is not admitted by the pleadings that Defendant was an accommodation endorser, or that he sustained the relation of surety to the maker of the note, nor that the Plaintiff had notice of the existence of any such relation; nor do any of these facts appear in the case. Hence Defendant has not

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brought himself within the rule which entitles a surety to the benefit of collaterals or discharges him in case they are destroyed. *Pitt et al. vs. Congdon*, 2 *Comstock's R.*, 352-54; *Hurd vs. Little*, 12 *Mass. R.*, 503; *Trimble vs. Thorne*, 16 *J. R.*, 152; *Bradley vs. Warren*, 6 *Wend.*, 613.

CHATFIELD & BUELL, Counsel for Appellant.

CORNELL & MANN, Counsel for Respondent.

By the Court—FLANDRAU, J.—Under *section* 51, *page* 537, *of the Compiled Statutes*, a Defendant has the same time to answer a complaint after it is served upon him, that he had of unexpired time, when he served notice of appearance. In this case the summons was served on the 4th of October. The Defendant had until the 24th of October inclusive, in which to answer. He appeared in the action October 8th, by mail. The Plaintiff had until the 14th to serve his complaint. He served it on the 15th, and no objection was made. The Defendant at the time he appeared, had sixteen days left to answer in; he therefore had the same number of days after the 15th of October, the day when the complaint was served, which gave him until the 31st inclusive. He answered on the 29th and was in time.

The language of the statute is as follows: "And if the Defendant appear within ten days after the service of the summons, the Plaintiff must serve a copy of the complaint on the Defendant or his attorney within three days after the notice of such appearance, and the Defendant shall have *at least* ten days thereafter to answer the same." The effect of this statute is to put it in the power of the Defendant to enlarge the time to plead in every case where he waits until the the tenth day after the service of the summons before appearing, unless the Plaintiff serves his complaint on the same day the appearance is made, which is practically out of the question where the attorneys live at different and distant points. The meaning of the act clearly is that the Defendant shall have as near his twenty days as he pleases to secure by a prompt appearance, and never less than ten, if he postpones

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it until the last day. It is quite similar to the practice in England, and in New York prior to the code, where the Defendant served an order for a bill of particulars of the Plaintiff's demand. He had the same time to plead after the particulars were rendered as he had when the original order was served. *Graham's Practice*, 513; 8 *Cow.*, 132; 13 *East.*, 508. Or where oyer of a bond or deed was demanded. *Graham's Practice*, 521.

Where a Defendant pleads in time, as he did in this case, the Court has no discretion on the question of opening up a judgment entered against him by default. A motion for this purpose is not an appeal to the favor of the Court, but an application for the enforcement of a right, and a denial of it may be reviewed in this Court. Where the answer is not in time, a motion for leave to plead is addressed to the discretion and favor of the Court, and not appealable unless such discretion is abused.

The answer in this case of a former suit pending, is not well pleaded. The facts which are alleged to have been pleaded in the former suit, did not constitute such a counter claim as would prevent the Plaintiff from discontinuing his action. The counter claim contemplated by the statute (*Comp. Stat.*, *p.* 541, *sec.* 71; *id.*, *p.* 554, *sec.* 170) must be one upon which an action can be maintained by the Defendant, at law or in equity. 10 *How. Pr. R.*, 67, 71-2-3; 13 *How. Pr. R.*, 248. The secret agreement between Fletcher and Catlin not to resort to the security, if it amounted to anything at all, was no more than a defence to the note by the indorser. It is difficult to see how that fact could have formed the basis for an affirmative proceeding either at law or in equity. It is quite doubtful whether it even constituted a good defence at law; there was no consideration for the agreement, and Swift could have availed himself of the security as well with the agreement as if it had never been made. Its existence certainly could not have been pleaded in defence of the mortgage either as against Fletcher or Swift. This being the only defence set up to the former suit, (*folio* 44, *Paper Book*,) there was no objection to the Plaintiff discontinuing it.

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The other defence however entitled the Defendant to a judgment of dismissal upon the pleadings.

The act of March 8, 1860, *page* 216 *of the Session Laws* of that year, was evidently designed to compel parties whose demands were secured in the manner stated in the act, to proceed first to exhaust their securities before bringing suit upon the original claim. The assertion of such a power by the legislature, is warranted, and not in conflict with the constitution. It is merely regulating the order in which several remedies shall be pursued. The act says, if you hold a note or other personal demand, which is secured by mortgage or other collateral stated in the act, you shall not sue and obtain a personal judgment, until you have first resorted to your securities and exhausted them; then an action may be maintained for any deficit.

The first section of the act is imperative "that no suit shall be brought." The second section permits the creditor to elect whether he will sue or not, but imposes the penalty of forfeiture of his securities as a consequence of bringing suit. As long as parties are permitted by law to take securities by mortgage or otherwise, and are allowed by the constitution, "a certain remedy in the laws for all injuries or wrongs which they may receive in their personal property or character," they cannot be deprived by the legislature of proper and reasonable remedies upon all contracts which they may make, that are valid at their inception. Nor can the enforcement of one be made to depend upon the abandonment of another. At the time this note and mortgage were made, they were both valid in the law and the owner of them was entitled to a "certain remedy" to enforce them. The Legislature has the power to declare the manner or order in which such remedy shall be urged or employed, but not to enact that the execution of one shall be at the expense of the other. It is said however that the statute gives an election to the creditor which remedy he will pursue, and that on making his selection, if he chooses to bring his action on the original demand in the first instance, the forfeiture of the security is his own act, and not that of the legislature. We think this argument, although specious, is sophistical. The legislature has no right,

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directly or indirectly, mediately or immediately, to declare the forfeiture of contracts or even to impair their obligation. It is the duty of that branch of the government to furnish to the citizens " certain remedies for all injuries or wrongs, freely and without purchase, completely and without denial, promptly and without delay," in obedience to the constitution, and it is equally the duty of the judicial branch to see that he is not deprived of them.

The legislature has reached the limit of its power in the first section, in prescribing the order in which creditors shall pursue their remedies. The second section, so far as it permits an election, is in conflict with the first, and also with the spirit of the act; and so far as it provides for the release and discharge of securities, it is in conflict with the Constitution of the United States, and of this State, which prohibit the passage of any law impairing the obligation of contracts, and consequently is void.

The note being secured, and the Defendant being party to the note as indorser, the security was as much for his benefit as for that of the holder, and falls within the spirit of the law. The Plaintiff could not maintain a suit upon the note until he had first exhausted the mortgage.

Judgment reversed.

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JOHN R. IRVINE, Appellant, *vs.* LAWRENCE MEYERS & Co., Respondents.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

The granting or refusal of an application for leave to propose a case after the time prescribed by statute has expired, is always within the discretion of the Court, and decisions thereon are not appealable. Nothing but an abuse of this discretion will justify the interference of this Court.

It is only in actions tried by jury that it is necessary for the Appellant to make a case. In actions tried by the Court or a Referee, this Court will review the question whether the facts found sustain the conclusions of law, upon the report of the Referee or finding of the Court, without a case embodying them. The statute provides for the preparation of a case within five days after trial before the Court or a Referee, and the trial in such cases must be continued or considered pending until the filing of the decision.

When a motion is once denied for any cause, technical or on the merits, the defeated party must obtain leave from the Court before he can renew it upon the same state of facts.

Plaintiffs sued Defendant and others in the Second District Court for goods sold. The Defendant alone answered. The case was referred to a referee, who reported for the Plaintiffs, and judgment was entered on the report. Sometime after judgment was entered, Defendant moved for leave to make a case, which motion was denied, Defendant having omitted to serve part of his moving papers. On the denial of the first motion no leave to renew was asked or granted. The Defendant afterwards made another motion for leave to make a case. Both motions were made before the Judge. On the second motion affidavits on both sides were read and the motion denied. The Defendant appealed.

Points and Authorities for Appellant.

I.—The statutes and rules of Court having made no provisions for the making and service of a case or bill of exceptions in actions tried before a referee, it is the duty of the Judge or Court below, upon application, whenever the testimony is necessary to a proper understanding of the errors alleged or assigned, to order a case or bill of exceptions, as the circumstances may demand, to be made and served within a reasona-

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ble time after the trial. *Morrison vs. March*, 4 *Minn. R.*, 422; *Tremain vs. Rider*, 13 *How. Pr. R.*, 148; *Johnson vs. Whitbeck*, 12 *How. Pr. R.*, 574, *&c.*

II.—That upon an application for leave to make and serve a "case," the Court or Judge before whom it is made should only look to the fact, whether the testimony or a case is necessary to a proper understanding of the alleged errors, and if so, then such leave should be granted without regard to the character of the defence, as it is the right of all parties who feel themselves aggrieved, to have the errors which they allege to exist reviewed by the appellate court.

III.—That when a case or bill of exceptions is necessary to a proper understanding of the errors alleged, the Supreme Court, on appeal, and especially where application for leave to make and serve a case has been made below, will supply the refusal of the Judge or Court below by ordering a case to be made and served. *Morrison vs. March*, 4 *Minn.*, 422.

IV.—The referee erred in that the finding of facts are unsupported by the testimony, as there is no evidence to show that Lawrence Meyers and Philip Pike constituted the firm of Lawrence Meyers & Co.; or to show that the firm name of the Plaintiffs was Lawrence Meyers & Co., or that there was any such firm as Lawrence Meyers & Co., or even that the Plaintiffs constituted a firm in 1856, when their goods are alleged to have been purchased. 1 *Grah. N. T.*, 271 *and* 2.

V.—The referee erred in admitting the letter of B. F. Irvine & Co., addressed to Lawrence Meyers & Co., and in refusing to non-suit the Plaintiffs. *Grah. N. T.*, 279, *&c.*

Points and Authorities for Respondents.

I.—The order is not appealable.

(*a*) This is the order of the Judge, and not of the Court, and no appeal lies to this Court from the chamber order of a District Court Judge. An appeal is only allowed from a judgment, or order of the Court. *Comp. Stats. p.* 621, *sec.* 1. If a party is desirous of having the right of appeal, he must apply in the first instance to the Court.

(*b*) Even were it the order of the Court, it is not appealable.

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It is not comprehended in any of the classes in which the appeal will lie. *Laws of* 1861, *p.* 133.

It does not involve the merits of the action or any part thereof. Moreover, that subdivision only applies to orders made before judgment. The only orders made after judgment which are appealable are specified in subdivision 6th.

This order is not comprehended under *sec.* 6; *King vs. Merchants' Exchange*, 1 *Selden*, 547, is a case precisely in point. 1 *Selden*, 547; *Wakeman vs. Rice*, 3 *Comstock*, 334.

The Court below having in its discretion denied his application, the order is not appealable. 1 *Selden*, 547.

II.—Even were the order appealable, it should be affirmed.

(*a*) It was *res judicata*, a similar motion having been previously denied, and without leave to renew. *Dollfus vs. French*, 5 *Hill*, 493, *and cases cited; Willet vs. Hayerweather*, 1 *Barb.*, 72.

D. Cooper, Counsel for Appellant.

Allis & Peckham, Counsel for Respondents.

By the Court—Flandrau, J.—The time to serve the proposed case had expired, and the application for leave to serve a case after the prescribed time, was addressed to the favor of the Court, and was not based upon any right of the Defendant. The granting or refusal of such applications are always within the discretion of the Court, and such decisions are not appealable. 1 *Selden*, 547. The Court in that case held a motion for leave to file exceptions to the report of a referee after the statute time had expired, was addressed to the discretion of the Court, and an order denying it was not appealable. See also, 3 *Comst.*, 334. The motion did not differ from the ordinary application to file an answer, reply or any other paper, after the expiration of the time allowed by law. The Court may or may not grant the favor in his discretion, and nothing but an abuse of his discretion will justify the interference of this Court.

The Counsel for the Appellant seems to think that we have held in the case of *Morrison vs. March*, 4 *Minn.*, 422, that the statute requiring a bill of exceptions or case to be made within five days after the trial does not apply to a trial before the

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Court or a referee. Such however is not the case. The question there, was, whether the Appellant must make a case in all appeals whether tried by jury, court or referee, and we held that it was necessary only in cases tried by jury. That in cases tried by the Court or a referee, we would review the question whether the facts found sustained the conclusions of law upon the report of the referee or finding of the court, without a case made embodying them. At pages 426-27, we say, "The counsel says that our statute makes it imperative that a case shall be made whenever an appeal is taken, and cites *Comp. Stats., p.* 565, *sec.* 63. But it will be seen on a careful examination of this section that it only applies to cases tried by a jury, and not to a trial by the Court where the decision may be filed out of term as well as in term."

It is true that this section is so limited in its operation because of the peculiar language used. It says:

"The application for a cause mentioned in the fourth and fifth subdivisions of section fifty-nine, can only be made when notice thereof, oral or written, was given *in open court*, immediately after the verdict or other decision rendered," &c.

Of course, a trial before a referee or the Court does not suppose a decision in term, and prevents the possibility of giving notice in open Court as required by that section, immediately after the decision rendered, and must refer only to trials by jury. But the 60th section makes the proper provision for the case of a trial by the Court or a referee, and does provide for the preparation of a case within five days after the trial, and the trial in such cases must be continued or considered pending until the filing of the decision.

If the order was appealable, we have very little doubt about the correctness of the practice below. When a motion is once denied for any cause, technical or on the merits, the defeated party must obtain leave from the Court before he can renew it upon the same state of facts. The usual mode is to insert a clause in the order denying the first motion, that it shall be without prejudice to the motion being renewed. There is no pretence that the Court abused the discretionary powers reposed in him.

Appeal dismissed.

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JOHN R. IRVINE, *et al.*, Appellants, *vs.* LAWRENCE MYERS & Co. Respondents.

MOTION IN THE SUPREME COURT, TO SET OFF CERTAIN JUDGMENTS.

Judgments in this Court may be set off upon motion,—and where one of the judgments is upon appeal, and the appeal undetermined, the motion may remain undecided until the final determination of the appeal, in order that the judgments may be set off in the event of affirmance.

Where there are judgments against, and in favor of each party to an action, rendered upon different trials thereof, the assignee of one of the judgments cannot escape having had notice of the judgment against his assignor at the time he took the assignment, the judgment being in the same action, upon a retrial upon the same record. And having such notice, he takes the judgment assigned, subject to the equitable right of the debtors therein, to have their judgment set off against it.

The judgment sought to be satisfied by set off, being in the Supreme Court, the motion for set off should be made in that Court, as it can act directly upon the record by its order.

By the Court—FLANDRAU, J.—Lawrence Myers & Co. recovered a judgment against John R. Irvine, in the District Court of Ramsey County, for the sum of three hundred dollars and upwards. Irvine took an appeal from the judgment of this Court, and procured a reversal, recovering judgment against Lawrence Myers & Co., for costs, amounting to some twenty-five dollars, which judgment was entered in this Court. The case was retried in the District Court, and a second judgment recovered by the Plaintiffs against Irvine for about three hundred dollars. Irvine again appealed to this Court from the judgment so recovered against him. Irvine caused execution to be issued upon his judgment in this Court, against Lawrence Myers & Co., for costs, and placed it in the sheriff's hands, directing him to levy upon the judgment held by Lawrence Myers & Co., against him, which levy was made, and the judgment advertised for sale. At this point in the proceedings, Lawrence Myers & Co. move this Court to set aside the levy made upon their judgment, and to have the two judgments set off, the one against the other, that the lesser may be satisfied.

Various objections are urged by the counsel for Irvine against the motion.

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First.—That judgments cannot be set off on motion, but only by bill; and upon this point the counsel seemed very confident. I think the only answer that should be made to this position is that the counsel is mistaken, it being a very familiar practice in the courts. We sanctioned it in the case of *Temple & Beaupre vs. Scott*, 3 *Minn. R.*, 419.

Second.—That the judgment in the District Court sought to be offset is appealed from and undetermined. This was true at the time the motion was argued, but is now obviated by the affirmance of the judgment at the present term of this Court. We would have retained the motion undecided, together with the stay which had been taken upon the execution, until the final determination of the appeal, had it been necessary, in order that the judgments might have been set off in the event of affirmance. *Winslow vs. Hathaway*, 1 *Pick.*, 211.

It is unnecessary to consider the question whether Irvine could levy upon a judgment against himself, or whether the sheriff should *sell* or *collect* a judgment levied upon, as we think that judgments should always be offset against each other when they are final between the parties, and their rights fixed under them.

An affidavit of J. James Herr was read on the motion, alleging that the judgment in favor of Irvine, in this Court, was on the 7th day of November, 1861, as he believes, assigned to him, and that he was, at the date of the issuance of the execution thereon, and still is, the owner of the same. Herr cannot escape having had notice of the judgment against Irvine at the time he took the assignment, as the judgment is in the same action, upon a retrial upon the same record. Having notice, he took the judgment subject to the equitable right of Lawrence Myers & Co., to have it set off against their judgment. *Nixon vs. Gregory*, 5 *How. Pr. R.*, 339; *Kinnsley, Brisbine, et al., vs. Newhall & Johnson, decided at the July term*, 1861, 5 *Minn.*, 273. It is not necessary, therefore, to criticise the affidavit of Herr, as to its sufficiency, about which doubts were entertained on the argument.

The counsel was correct in selecting the Court in which the judgment against his client was rendered as the tribunal in

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which to move for the setoff, as that Court alone has power to control directly the proceedings on the judgment. The District Court could only enforce a setoff so as to satisfy the judgment in this Court, by attachment, while we can, by order, act directly upon the record. *Cook vs. Smith*, 7 *Hill*, 186.

The judgments should be set off against each other, the lesser one satisfied, and the greater satisfied *pro tanto*. The execution that has been issued on the judgment in this Court is perpetually stayed.

THE NORTH WESTERN EXPRESS COMPANY, Plaintiffs in Error *vs.* PETER LANDES, Defendant in Error.

ERROR TO THE DISTRICT COURT OF WASHINGTON COUNTY.

The issuance of a writ of error and putting in bail did not operate as a *supersedeas*, or even stay of execution which had been levied before the issuance of the writ, but the sheriff could proceed to a sale as if no writ of error had been sued out. Our statute (*Stats of Minn.*, p. 623-4, sec. 25.) provides a stay of execution in case of writ of error and bond, but the stay does not supersede the execution so as to annul what has been done under it; it simply checks the sheriff from proceeding further. The sheriff may retain the property levied upon until the decision of the Court above, or the order of the Court.

Judgment had been rendered in the Court below against Plaintiffs in Error, execution issued, and levied upon their personal property. The Defendants sued out a writ of error, and filed a bond as a supersedeas. Upon service of the writ and filing the bond, they demanded a release of the property from the effects of the levy. The sheriff refusing to deliver, the Plaintiffs in Error obtained a rule in this Court, upon the sheriff, to show cause why the property should not be released.

The Respondent moves the Court to quash the rule—

1. Because, as to the first part of the rule, this Court has no jurisdiction of the subject matter. If the Plaintiff in Error would have restitution of the goods levied, he should have applied to the Court below.

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2. Because, if this Court has jurisdiction, nothing is shown entitling Plaintiffs in Error to restitution; on the contrary, it appears affirmatively, they are not entitled to restitution.

3. Because it does not appear that the Respondent has omitted to do any act which by law, or the process or command of this Court, he is required to do, or that he has done any act the doing whereof he was required by law, or the process or command of this Court, to abstain from doing.

4. Because it appears by the affidavit on which the rule is founded, affirmatively, that the Respondent was and is proceeding in the strict line of his official duty, in obedience to the law and the process of this Court; and nothing appears from the affidavit which should put the Respondent to answer or show cause as to any matter stated in the rule. *Minn. Stats.* 623 *and* 624, *secs.* 23, 24, 25 *and* 30.

A writ of error operates as a supersedeas from the time of filing the bond; and if no sale has been made by the sheriff on execution, it stays him from doing so. *Stat. vs. Page*, 1 *Har. and J.*, 475. See *Whetcroft vs. Drew*, 1 *Har. and J.*, 482; *Johnson vs. Goldsborough*, 1 *Har. and J.*, 499; *Arnold vs. Fuller*, 1 *Ham.*, 458; *Kinnie vs. Whitford*, 17 *Johns.*, 34; *Blanchard vs. Myers*, 9 *Johns.*, 66; *Slusser vs. Chapline*, 4 *Har., and McHenry*, 221; *Beatty vs. Chapline*, 2 *Har. and J.*, 7; *Brougham vs. Clapp*, 6 *Cow.*, 611; *Ferris vs. Doug. lass*, 20 *Wend.*, 626; *Delafield vs. Sandford*, 3 *Hill*, 473; *People vs. Judges of N. Y. C. P.* 1 *Wend.*, 81; 7 *Cow.*, 412, 417, *and* 419; *Brisban vs. Coines*, 11 *Johns.*, 197; *Craig vs. Scott*, 1 *Wend.*, 35; *Davis vs. Hood*, 13 *Penn. State R.*, 1 *Harris*, 171; 2 *Durnf. & East.*, 45; *Meriton vs. Stevens*, *Willes R.*, 27; *Barnes*, 305., 3 *Minn.*, 207, 222.

Van Etten and Officer, Counsel for Plaintiffs in Error.

W. H. Burt, Counsel for Defendant in Error.

By the Court—Flandrau, J.—The issuance of a writ of error and putting in bail did not operate as a supersedeas, or even stay of an execution, which had been levied before the issuance of the writ, but the sheriff could proceed to a sale as if no writ of error had been sued out. *Blanchard vs.*

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Myers, 9 *Johns.*, 66; *Merriton vs. Stevens*, *Willes's Rep.*, 271; *Kinnie vs. Whitford*, 17 *Johns.* 34; *Delafield vs. Sandford*, 3 *Hill*, 473; *Graham's Practice*, 334-5. The statute of this State concerning the effect of a writ of error and bond upon an execution, is as follows: "No execution shall be issued thereafter upon the judgment complained of during the pending (pendency) of the writ of error, and if execution shall have been already issued, the clerk shall make and sign a certificate of the issuing of the writ of error and the filing of the bond; and after notice of such certificate to the officer holding such execution, all further proceedings thereon shall be stayed. *Comp. Stats.*, 623-4, *sec.* 25. The notice or certificate issued by the clerk in this case was not, perhaps, exactly what the statute contemplates, but as it conveyed notice to the sheriff that a writ of error had issued and bond been filed, it was sufficient to stay the execution.

The stay contemplated by the act does not supersede the execution so as to annul what has been done under it, but simply checks the sheriff from proceeding further. The sheriff may retain the property levied upon until the decision of the Court above, or the order of the Court.

The motion is denied, and sheriff discharged.

CHARLES WELLS and DANIEL LOW, Plaintiffs in Error, *vs.* HENRY F. MASTERSON, Defendant in Error.

ERROR TO THE DISTRICT COURT OF RAMSEY COUNTY.

A complaint in ejectment alleged that Plaintiffs were the absolute owners in fee of the land: that the Defendant was in the actual possession thereof; that Plaintiffs had demanded in writing of the Defendant that he surrender possession thereof to them; that he had refused to do so, and that he wrongfully and unlawfully withheld possession. These facts were sufficient to entitle the Plaintiffs to recover.

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Points and Authorities of Plaintiffs in Error.

I.—In an action under the code to recover possession of real estate, the complaint is sufficient, if it states that the Plaintiff has the lawful title, as owner in fee simple, to the premises described therein, and that the Defendant is in possession of the premises, and unlawfully withholds possession thereof from the Plaintiff, and the Plaintiff demands that the Defendant may surrender the possession thereof to him. *Walker vs. Lockwood*, 23 *Barb.*, 228.

SANBORN & LUND, Counsel for Plaintiffs in Error.

MASTERSON & SIMONS, Counsel for Defendant in Error.

By the Court—FLANDRAU, J.—The complaint alleges that the Plaintiffs are the "absolute owners in fee" of the lands in controversy; that the Defendant is in the actual possession of them; that the Plaintiffs have demanded in writing of the Defendant that he surrender the possession to them; that the Defendant has refused so to do, and that he wrongfully and unlawfully withholds the possession from the Plaintiffs. These facts are sufficient to entitle the Plaintiffs to recover. It is true that title in fee in the Plaintiff, and actual and lawful possession in the Defendant are not in any way incompatible and may coexist. And also when possession is alleged in a Defendant, it will not be presumed to be unlawful; but this complaint directly charges the Defendant's possession after the notice to surrender to be unlawful, and that is sufficient with the title in fee to sustain ejectment. We held exactly such a complaint good in the case of *McClane vs. White*, decided at the July term, 1861, 5 *Minn.*, 178. This case is decided by that.

The judgment is reversed, and the case remanded with leave to the Defendant to answer over within ten days after service upon him of notice of this decision on the payment of the costs of this Court.

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THE ESTATE OF JOHN COLUMBUS, Appellant, *vs.* JOHN MONTI, Respondent.

MOTION TO DISMISS AN APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY.

There should always be a competent party representing every interest that is litigated in Court, in order that the process of the Court may have some one to operate upon. The "Estate" of a decedent has no legal personality that can have a status in Court. It must be represented by some person or persons capable of suing or being sued.

GOLD T. CURTIS, Counsel for Appellant.

W. H. BURT, Counsel for Respondent.

By the Court—FLANDRAU, J.—John Monti filed a claim against the estate of John Columbus, deceased, with the commissioners appointed by the Probate Court to receive, examine and adjust the claims against that estate. Monti, feeling aggrieved by the decision of the commissioners, took an appeal to the District Court, where the matter was retried and Monti recovered a verdict for the full amount of his demand. Some one representing the estate of Columbus, or interested therein in some way, but who, does not appear, brings this appeal, alleging errors on the trial, and seeking a reversal and new trial. The appeal, as appears from the title of the cause in this Court, is taken in the name of "The Estate of John Columbus." The statute (*Comp. Stats.*, 442, *sec.* 20,) allows the executor, administrator or a creditor of the estate to appeal to the District Court from the decision of the commissioners; and *section* 21, *same page*, gives any claimant against the estate the same right. *Section* 29, *page* 443, provides that when an executor or administrator declines to appeal from the decision of the commissioners, any person interested in the estate as creditor, devisee, legatee or heir, may bring the ap-

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peal. *Section* 25, *page* 443, provides that questions of law may be carried to the Supreme Court.

It is objected in this case that the appeal is not brought by any party authorized by the statute to appeal, nor by any competent party, and we are asked to dismiss it. It is our opinion that the objection is well taken. There should always be a competent party representing every interest that is litigated in Court, in order that the process of the Court may have some one to operate upon. The estate of a decedent has no legal personality that can have a status in Court. It is merely the subject matter of the contest, and must in all transactions connected with it be represented by some person or persons capable in the law of suing and being sued. The controversy therefore is not properly before this Court, and the appeal should be dismissed.

It is unnecessary, and perhaps improper, that we should enter into a discussion of the merits, when we have no jurisdiction of the subject matter of the appeal.

Appeal dismissed.

THE COMMONWEALTH INSURANCE COMPANY, Appellant, *vs.* MICHAEL PIERRO, Respondent.

MOTION TO DISMISS AN APPEAL.

A Defendant demurred to a complaint upon two separate reasons or specifications, wherein he claimed the complaint did not state facts sufficient to constitute a cause of action. One of these reasons or specifications the Court held well taken, and the other insufficient. The Defendant then appealed from that part of the order disallowing one of these specifications, claiming the right under *Chap.* 25, *Sess. Laws of* 1861, *p.* 186. *Held* that the appeal does not lie. It would be unjust to allow an appeal to test the correctness of a decision upon an abstract question, which may ultimately have no bearing upon the case.

Where the return to an appeal is not filed in this Court until too late to permit the giving ten days' notice of argument, as required by Rule XV, of this Court, the rule does not apply, and the Respondent may move a dismissal at any time during the term, upon eight days' notice of motion.

SIMONTON & MALMROS, Counsel for Appellant.

J. & C. D. GILFILLAN, Counsel for Respondent.

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By the Court—ATWATER, J.—The Appellant (Defendant below) demurred to the complaint and the demurrer was sustained, and from the order entered thereon the Defendant appeals to this Court.

The ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action. The demurrer stated two reasons or specifications, showing wherein the complaint did not state facts sufficient to constitute a cause of action. One of these reasons or specifications the Court held well taken, and the other insufficient. From that part of the order disallowing one of these specifications the Defendant appeals.

This is somewhat novel practice, for a party interposing a demurrer to appeal from an order sustaining the same, but the Defendant claims the right so to do under *chap.* 25 *of Session Laws of* 1861, *p.* 136. By the terms of that act the Judge is required to give his decision in writing upon each point or question submitted to him. As to what constitutes a "point or question" within the meaning of this act, may not be always easy to determine; but in case of demurrer we think it can mean no more than one of the grounds of a demurrer specified in the statutes. To the same pleading one or more of these grounds may be applicable, and if a decision is given upon each separate statutory ground, it is all that can be required, and a decision upon each subdivision, or reason assigned showing the applicability of the ground of demurrer, is unnecessary. No useful purpose can be attained by giving a construction to the statute requiring this, and it would often impose an amount of labor on the Judge both unnecessary and burdensome.

But even were it certain that the statute required a decision upon each subdivision or reason that counsel might choose to assign under a general ground of demurrer, and such decision should be rendered in writing, it by no means follows that a party would be permitted to appeal from such decision, when, as in this case, upon the general ground, the decision is in Appellant's favor. What the object intended to be attained by this statute is, does not very clearly appear, though we

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perhaps may form a correct conjecture; but it manifestly could not have been to allow appeals in cases like the present, unless we hold that the legislature intended to violate the constitution by throwing obstructions in the way of obtaining justice. The Defendant here has demurred and his demurrer has been sustained on the ground assigned by him. But the Court has decided that one of the reasons assigned why the complaint did not state facts sufficient to constitute a cause of action, was incorrect. Whether this part of the decision was right or wrong in the present stage of the case, cannot be material, for the Plaintiff cannot proceed without amending his complaint, and the amended pleading may contain nothing of the objectionable matter. It would be manifestly unjust to permit the delay and expense of an appeal, to test the correctness of a decision upon an abstract question, which perhaps ultimately will have no bearing whatever upon the case.

The Defendant also objects, that this motion is too late, and should have been noticed for and made upon the first day of term under rule XV.

By reference to the record it appears that the return to this appeal was not filed in this Court until the 26th day of November last—too late to permit of giving ten days notice of argument as required by the rules. Where such is the case, we think the above rule not applicable, but that the respondent may move a dismissal at any time during the term, upon eight days notice of motion.

The appeal must be dismissed.

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WILLIAM M. SHERRERD, Appellant, *vs.* CYNTHIA A. FRAZER, *et als.*, Respondents.

APPEAL FROM THE DISTRICT COURT OF SCOTT COUNTY.

Where the original papers are used upon a motion relating to the record in a cause, the Court may take judicial notice of the Clerk's signature to the file marks, although they may be from another District. But the records should never be allowed to leave the clerk's office for any purpose without an order from the Court. Exemplifications of the records, and also ;sworn copies properly examined and compared, and the affidavits of parties familiar with the facts upon which the questions arise, are always competent evidence in such motions.

The District Court has not power to compel a party to enter a judgment in an action, or to do any other affirmative act in the progress of a cause, which relates merely to the conduct of the same. Where the duty is clear and the other party is interested in its performance, the Court may always command it to be done under the penalty of being turned out of Court, if it is the Plaintiff, and of allowing the Plaintiff to proceed to judgment, if it is the Defendant who disobeys. If a Defendant obtains a verdict or other decision in a cause which requires to be perfected in judgment before an appeal or writ of error can be taken, and refuses to pursue it farther, the Plaintiff, if he desires a review, may obtain an order that the Defendant perfect it, or that it be vacated and his defence stricken out, or the Court may impose any similar appropriate and effective penalty to compel obedience. *The Syllabus in Deuel vs. Hawke, 2 Minn. R., 50, corrected.*

Points and Authorities of Appellant.

I.—The District Court has no power to compel a party to proceed and enter a judgment. 2 *Minn. Rep., Deuel vs. Hawke, p.* 50.

II.—The District Court has no power to allow an adverse party to cause the entry of judgment to be made by the Clerk of the Court. *See same case in the opinion of Flandrau, J.*

III.—The District Court has no power to order a judgment to be entered forthwith, thereby depriving the party of his costs.

Points and Authorities of Respondents.

I.—The Appellant having long delayed to make a record of his judgment, and having refused to proceed, the order was properly granted to enable a review. 3 *Minn. R.*, 207; *Bank*

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of Geneva vs. Hotchkiss, 1 *Code R. N. S.*, 113; 9 *Pr. R.*, 86; 5 *ib.*, 478; *Sentenhon vs. May, N. Y.* 1 *Code R. N. S.*, 111.

L. M. & J. H. Brown, Counsel for Appellant.

Henry Hinds, Counsel for Respondents.

By the Court—Flandrau, J.—The Plaintiff brought an action of ejectment against the Defendants to recover the possession of certain real estate in Shakopee, county of Scott. Pending the action, an injunction was issued on motion of the Plaintiffs. The Defendant, Overton, answered separately, raising an issue of fact, and the other Defendants demurred to the complaint. The issue of fact was tried, and the Plaintiff had a general verdict in his favor, except on the question of damages, which the Plaintiff had waived. The issue of law was also tried and judgment given for the Plaintiff on the demurrer, with leave for the Defendants to answer, which they did not avail themselves of within the time allowed. The Plaintiff has never perfected judgment, either upon the verdict or the decision on the demurrer, but refuses to do so.

Upon this state of facts the Defendants move the Court for an order compelling the Plaintiff to perfect his judgment of record. Objection was made to the papers offered in support of the motion. Whether the papers were the original records, or certified or sworn copies, does not clearly appear. If they were the originals the Court might take judicial notice of the clerk's signature to the file marks, although from another district. But without an order from the Court permitting the records to be taken from the files for special reasons, they should never be allowed by the clerk to leave the office for any purpose. If they were exemplifications of the records they were receivable. 2 *Cow. and Hill's Notes to Phil. Ev.*, 278, 281. And they were also admissible if they were sworn copies properly examined and compared. *Id.* 287, 340, 451. The Judge, however, held that they were not necessary, as the affidavit of the Defendant's attorney contained a full history of the case, sufficient to put him in possession of all the facts that were material to a decision of the motion. In this

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he was right. On such motions the Court only needs to be advised of the facts upon which the questions arise, and affidavits of parties familiar with them are always competent evidence.

The facts above detailed not being disputed, the Court made an order that the Plaintiff proceed forthwith to perfect his judgment of record upon the verdict, or upon the demurrer, and that in default, the Defendant have leave to cause the same to be entered by the clerk. The Plaintiff did not obey the order, and the judgment was entered by the clerk. From this order an appeal is taken.

We are cited to the case of *Deuel vs. Hawks*, 2 *Minn. R.* 50, by the Appellant, for authority that the Court had not the power to make such an order; and to *Furlong v. Griffin & Fullerton*, 3 *Minn., R.*, 207, for authority to sustain the order, by the Respondent. In the first case an order was made by the Court compelling the Plaintiff to enter a judgment different from the one he was entitled to, which he did, and took an appeal from the order. We reversed the order, holding in the opinion delivered by Justice Atwater, that a Plaintiff could not be "compelled to proceed in an action and enter judgment; but if he neglects to prosecute unreasonably, the Defendant may have an order of dismissal, under *Subdn.* 2 *of sec.* 170 *Comp Stats., p.* 554, or in certain cases under *sec.* 10, *p.* 558, *Comp. Stats.*" In the opinion delivered in that case by myself, this language is used: "The proper order for the Court to have made on being apprised of the fact, was, that the Plaintiff proceed at once and perfect his judgment, or his action should be dismissed." The reporter goes too far in giving the effect of my opinion.

It will be seen that this case goes no farther than to hold that the Plaintiff may be turned out of Court if he will not prosecute with reasonable dispatch.

The next case in the 3d volume involved the question only of the period when the time within which a writ of error could be taken, began to run. We held that it commenced at the decision of the Court, and not at the time such decision was perfected of record. In commenting upon the case, we say in the opinion, "We do not see that this view can oper-

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ate to deprive the defeated party of his right to the writ, as it has been suggested that the successful party may delay the entry of his judgment until after the expiration of the year next ensuing its rendition. Any party desiring a review of the decision by this process, may compel the successful party to perfect his judgment of record within a reasonable time after its rendition, by application to the Court for that purpose."

This case is in strict conformity with *Deuel vs. Hawke*, and founded upon it. We did not say that if the Plaintiff refused to obey, his action might be dismissed as a penalty, for want of prosecution; the practice in this respect had been settled in the previous case. It was a mere suggestion thrown out in a case where the point was not involved.

We do not think the Court has the power to compel a party to enter a judgment in an action, or to do any other affirmative act in the progress of a cause which relates merely to the conduct of the same. Where the duty is clear, and the other party is interested in its performance, the Court may always command it to be done under the penalty of being turned out of Court, if it is the Plaintiff, and of allowing the Plaintiff to proceed to judgment, if it is the Defendant who disobeys. If a Defendant obtains a verdict or other decision in a cause which requires to be perfected in judgment before an appeal or writ of error can be taken, and refuses to pursue it farther, the Plaintiff, if he desires a review, may obtain an order that the Defendant perfect it, or that it be vacated and his defence be stricken out, or the Court may impose any similar appropriate and effective penalty to compel obedience. The Courts, through such means, possess sufficient coercive powers to prevent disorders from occurring in practice to the prejudice of suitors, and will never hesitate to exercise them in cases of contumacy.

The order in this case is unauthorised, and must be reversed.

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CYNTHIA A. FRAZER, *et al.*, Plaintiffs in Error, *vs.* WM. M. SHERRERD, Defendant in Error.

Upon the order referred to in the foregoing opinion, judgment was entered by the clerk in favor of the Plaintiff. The Defendant then sued out a writ of error to review the judgment.

By the Court—FLANDRAU, J.—Mr. Sherrerd commenced an action below against the above named Plaintiffs in Error. An issue of fact was made by Overton, and a demurrer put in to the complaint by the other Defendants. The Plaintiff succeeded upon both issues, but failed to perfect his judgment, and refused to proceed farther. The Defendants obtained an order commanding him to enter up his judgment forthwith, or that the Defendants cause the clerk to enter it for him. The Defendant still refused, and judgment was entered in his favor by the clerk. This is the judgment that the Plaintiffs in Error now seek to review. The order upon which the clerk entered this judgment was appealed to this Court by the Plaintiffs, and reversed. The judgment, of course, must fall with it. *Hawke vs. Deuel*, 2 *M. R.*, 58, 61. The syllabus of this case, as reported, does not present the main point decided.

There being no judgment to review, the writ of error is dismissed.

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Nash & McGroerty, Appellants, *vs.* Murnan & Grace, Respondents.

APPEAL FROM THE DISTRICT COURT OF RAMSEY COUNTY.

A complaint for balance due for work and labor stated,—that there was a written contract between the Plaintiff and Defendant,—that under and by virtue of such contract Plaintiff performed work and labor, within certain times, on certain sections of the Minneapolis & Cedar Valley R. R., naming the time and sections—the value of the labor performed—the amount paid, and the balance unpaid, with a proper demand for judgment for the balance. *Held*, to be good. The Defendants might take issue upon the contract or the performance thereof, or set up such other defence as they might have had.

The following is a copy of the complaint in this action:

The Plaintiffs above named respectfully show to the Court, that under and by virtue of a special contract in writing between them and the above named Defendants, they performed work and labor for said Defendants in and upon certain sections of the Minneapolis and Cedar Valley Railroad, to wit: No. 33 and 32, between the 28th day of August, 1858, and the 20th day of June, A. D. 1859, and that by the terms of said contract the Plaintiffs were entitled to the sum of $4,181, 11-100 from said Defendants for and on account of said work and labor.

Plaintiffs allege that they have been paid on account of said work and labor, only the sum of $3735.02. That there is now due to them on account of said work and labor, the sum of $488.09, &c., &c.

Points and Authorities for Appellants.

The Court erred in overruling the demurrer. Facts, and not legal conclusions should be stated. *Van Santford's Pl., pp.* 241 *to* 254; *Voorhees' Code*; 2 *Duer Rep.*, 273; 5 *Saunders*, 558; 8 *Am. Ed. Chitty's Pl., vol.* 1, *pp.* 288, 303, 332 *to* 336; 2 *Wend.*, 479.

J. B. Brisbin, Counsel for Appellants.

Smith & Gilman, Counsel for Respondents.

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By the Court—FLANDRAU, J.—The complaint in this action contains the essential issuable facts of a good cause of action for work and labor, as follows: 1st, that there was a written contract between the Plaintiff and Defendant; 2d, that under and by virtue of such contract they performed work and labor, within certain times, on certain sections of the Minneapolis and Cedar Valley Railroad, naming the time, and sections, which is a sufficient allegation that the contract was for work and labor upon the specified sections at the time stated; 3d, the value of the labor performed; 4th, the amount paid, and the balance unpaid, with a proper demand for judgment for the balance.

The Defendants may either take issue upon the contract, or the performance, or set up such other defence as they may have.

The order overruling the demurrer is affirmed. Case remanded with leave to the Defendants to answer within twenty days after service of notice of this decision.

WILLIAM FOWLER, *et als.*, Appellants, *vs.* JOHN ATKINSON, Respondent.

MOTION FOR RE-ARGUMENT OF CASE IN 5 MINN., 505.

Where an appeal is taken the paper books should in all cases show whether the appeal is from an order or judgment.

It is only by appeal from the judgment that an abuse of discretion may be reviewed, and not by writ of error, as stated in *Fowler vs Atkinson*, 5 *Minn.*, 505.

The mere addition of the words "Trustees of School District No. 5" to the signatures to a promissory note, will not relieve the makers from personal liability thereon. It must appear in or from the instrument itself, that they executed the same in their capacity as trustees. *See Sanborn vs. Neal et al.*, 4 *Minn.*, 126.

NEWELL & TOMPKINS, Counsel for Appellants.

L. E. THOMPSON, Counsel for Respondent.

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By the Court—ATWATER, J.—The motion is based upon the ground that the paper books furnished by Appellants to this Court, upon the argument of the case, (*see* 5 *Minn.*, 505,) did not contain the record of the final judgment in said action in the Court below, and that the decision of this Court was made upon the ground and under the belief that the appeal was from the order of the Court below, refusing Appellants leave to serve and file their amended answer, setting up mistake in the execution of the note, and not from the judgment in the action, when in fact the appeal was from the judgment and not from the order.

It is true that the Court were led into the error above referred to, from the defect in the paper books in disclosing that the appeal was from the judgment, and not from the order. And we here take occasion to state, that where an appeal is taken, the paper books should in all cases show whether the appeal is from an order or from a judgment. For though counsel may state upon the argument from what the appeal is taken, it cannot be expected that verbal statements of this nature should at all times be recollected by the Court, when deciding causes, perhaps a considerable time after the argument. And where the Court has been led into an error in its decision from the omission of the paper books to state the facts correctly, the party whose duty it is to prepare such books, if not estopped from moving for a re-argument to correct such error, would at least be required to present very strong equities to entitle him to a favor, which he is compelled to seek on account of his own neglect.

Upon a more careful examination of the case of *Fowler vs. Atkinson*, 5 *Minn.*, 505, we think the statement was inadvertently made, that an abuse of discretion may be reviewed by writ of error. It is only by appeal from the judgment that such error can be reached, and though the appeal in that case was from the judgment and not from an order, the decision was correct on the ground therein stated, to-wit, that there was no abuse of discretion, but on the contrary, we think the ruling of the Court was entirely correct. We are unanimously of the opinion, that the answer, even if taken as true,

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constituted no defence to the action. For the correction of the instrument as prayed for in the answer, to wit, by the addition of the description of Defendants as trustees of said school district, to their signatures to the note, would not have relieved them from personal liability on the note. In order to bring the case within the rule laid down in *Sanborn vs. Neal et al.*, 4 *Minn.*, 126, it must appear in or from the instrument itself that they executed the same in their capacity as trustees, and the answer does not seek to have the note so reformed. As the decision of that case was correct upon the merits, the motion for a re-argument must be denied.

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ANALYTICAL INDEX.

ABATEMENT.

See "ACTION," 1, 2, 7.

ABSTRACT OF TITLE.

1. A purchaser who relies upon an abstract of title, which does not exhibit the contents of the conveyances forming the chain of title, will be deemed guilty of *crassa negligentia*, and the fact that such is the usual custom of the country in the transfer of real estate, raises no equity in his favor. *Daughaday v. Paine et al.*, 443.

ACTION.

1. A judgment in a former suit for costs only, on the ground that the complaint contained no cause of action, and in which the merits were not litigated, constitutes no bar to a second suit for the same cause of action. *Gerrish & Brewster v. Pratt & Bunker*, 53.

2. Nor can such judgment be urged in abatement of the second suit after pleading to the merits. The proper way to take advantage of it in the second action, is to move for a stay of proceedings until the first judgment is paid. *Ib.*

3. A complaint, setting forth that the Plaintiff had executed, acknowledged and delivered to the obligee, a bond conditioned for the conveyance of certain real estate therein specified, upon being paid a certain amount of money, that said bond had been duly recorded, that default had been made by the obligee in making payment according to the terms of the contract, alleging that the obligor had performed on his part all that was required by the terms of the contract, and tendering the deed in Court and asking that the Defendant be required to pay the balance due and accept the deed, at or before a time certain to be fixed by the Court, or in default thereof, that the bond be delivered up to be cancelled, and the Defendant thereafter be barred of all right, title and interest in and to the premises, states a good cause of action. *Voss v. De Freudenrich et al.*, 95.

4. In an action brought under the statute to determine a conflicting claim to real estate, a denial of the Plaintiffs' possession forms an issue that must be tried; and it is error to enter judgment until such issue is determined. *Meighen et al. v. Strong*, 177.

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5. An attachment may issue in all actions brought for the recovery of money. *Morrison et als. v. Lovejoy et als.*, 183.

6. A mortgagee sold a piece of land under a foreclosure by advertisement by virtue of a power of sale contained in the mortgage, authorizing him to sell and pay himself whatever was due on the mortgage. In the notice of sale he claimed about twice as great a sum to be due as was actually due upon any calculation that could be made upon the terms of the note or mortgage. He became himself the purchaser, bidding the full amount alleged to be due. He refused a subsequent mortgagee the privilege of redeeming by paying what was in fact due, but insisted upon the whole sum bid being paid, and interest. The second mortgagee paid the whole amount under protest and brought suit to recover back the excess. *Held*, the action would lie. *Held also*, that a foreclosure under the statute by advertisement, which is regular within the terms of the power, is binding upon subsequent incumbrancers, notwithstanding they have no notice except such as is conveyed to them through that published in the newspaper. *Bennett et al. v. Healey*, 240.

7. Under the act of March 8, 1860, *Laws of* 1860, *p.* 216, a party who has taken security for a debt in any of the ways enumerated in the act, cannot maintain an action upon the debt until he has first exhausted his securities. But where he takes an assignment of what he supposes to be a valuable interest in property, as security, and afterwards discovers that it is of no value, he is not driven to a fruitless effort to realize upon the pretended security in the first instance, but may at once commence his action upon the original debt, and if the existence of the security is pleaded in abatement of the suit he may allege in reply that the security was valueless, and in fact no security, and upon establishing such fact upon the trial, he may have a judgment for the original demand. *Schalck et als. v. Harmon et als*, 265.

8. Under the act of March 5, 1858, *Stats. of Minn.*, *p.* 480, a defendant in any civil action is expressly required to interpose all equities, claims and demands existing in his favor at the time of the commencement of the action, or intervening before a final decision, by way of answer, or supplemental answer, in the nature of a counter claim. If not so interposed in the original action, they cannot be set up, asserted or enforced by another action. *Fowler et al. v. Atkinson*, 503.

9. A Justice of the Peace has nothing to do with actions or defences of a purely equitable nature. If a party is sued before a Justice, and has a good defence to the action in equity, he may appeal to the District Court, and interpose his equities by way of answer, as if the action were originally commenced there. The refusal of that Court to allow time to interpose his equities does not confer upon him the right to make them the subject of another action. *Ib.*

10. There should always be a competent party representing every interest that is litigated in Court, in order that the process of the Court may have some one to operate upon. The "Estate" of a decedent has no legal personality that can have a status in Court. It must be represented by some person or persons capable of suing or being sued. *The Estate of John Columbus v. Monti*, 568.

ACKNOWLEDGMENT.

1. The certificate of a Notary public to the acknowledgment of a deed is not conclusive evidence of the facts certified to by him, but the same may be rebutted by proof. *Dodge v. Hollinshead*, 25.

2. H. executed, acknowledged, and delivered a mortgage upon certain real estate belonging to the wife. His wife signed the mortgage, and the notary certified that she acknowledged the same on a private examination, separate and apart from her husband. The facts proved that she had never in any manner acknowledged the same, and that she never received any part of the consideration named in the mortgage. *Held*, that the acknowledgment on the part of the wife, required by statute, is an essential part of the execution of the instrument, without which no interest in the estate passes, and without such acknowledgment the mortgage is invalid so far as the separate estate of the wife is concerned. *Ib.* See also, *Annan v. Folsom*, 500.

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3. Previous to March 6th, 1852, Judges of Probate had no power to take the acknowledgment of conveyances of real estate. Subsequent to the last mentioned date they had such power. *R. S., p.* 211, *sec.* 8; *Comp. Stats.*, 495. *Baze v. Arper*, 220.

4. It is not necessary that official certificates of acknowledgment should be under seal unless the statute authorizing them expressly require it. If the certificate styles the officer taking it as an officer authorized by statute to perform the act, it will be *prima facie* evidence of his official character. No seal is required by our act in 1852. *Ib.*

5. The act of 1856, published on *page* 406 *of the Compiled Statutes*, does not comprehend acknowledgments of conveyances taken by Judges of Probate, but such only as were taken before the Clerks of the Supreme, District and Probate Courts. *Ib.*

6. The record of a conveyance acknowledged before an officer not authorized to take acknowledgments, is no notice to subsequent purchasers, but the deed was good against an attaching creditor until the passage of the act of 1858. *Chap.* 52, *sec.* 1, *General Laws* 1858. *Ib.*

7. The certificate of acknowledgment to a deed or mortgage need not be under seal, unless the statute authorizing the officer to take it expressly requires it. If the certificate styles the officer taking it as an officer authorized by law to perform the act, it will be *prima facie* evidence of his official character. The Statutes of this State in force in 1854, did not require a seal to such certificates. *Thompson et als. v. Morgan*, 292.

AFFIDAVITS.

See "AMENDMENT," "WITNESS."

AGENCY.

1. When an agent or attorney contracts on behalf of his principal, he must do so in the name of the principal, or the latter is not bound. When any one has authority to do an act, it should be done in the name of him who gives the authority; not in the name of the agent or attorney. *Sencerbox v. McGrade*, 484.

2. Although a mere receipt acknowledging payment of money may be varied or contradicted by parol, yet where it contains an agreement, condition or stipulation between the parties, it is in the nature of a contract, and is not liable to be varied by parol. So where a bill of sale named the vendee as J. W. S., agent for J. G. S., it was improper to admit parol proof that the sale was to J. G. S. *Ib.*

3. When a party states that he "was acting as agent for his brother," in a certain transaction, *non constat*, but that he might have been so acting on his own assumption and without any authority; neither the declarations of a party, nor his acts, can be given in evidence to prove that he is the agent of another. *Ib.*

4. Certain bankers gave their written receipt for money, "to be loaned out. We to account to the owner for principal and interest, less our charges, &c., not to exceed 2½ per cent. per annum." This contract created between the parties the relation of principal, and broker or agent. The agents were only limited in their conduct to the observance of good faith, and the exercise of proper care and circumspection. If they acted in good faith and loaned the money to a party solvent at the time of the loan, they are protected, notwithstanding such party subsequently became insolvent. Parol evidence, tending to show that the money was to be loaned for a period of six months from the time of its receipt, and that the brokers were to be liable for the amount and interest, would be in direct conflict with the terms of the receipt, and could not be received to contradict its written terms. *Wykoff v. Irvine et als.*, 496.

AMENDMENT.

1. Upon a judgment by default, the affidavit showing that no answer had been received appeared to have been sworn to before service of the summons. *Held*, that the Court had power to amend the record by inserting the true date when the affidavit was sworn to, if the facts showed that the date named in the jurat was an error. *Dunwell et als. v. Warden et al.*, 287.

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2. Several days after the hearing of a motion to amend, the moving party served additional affidavits on Defendants' Attorney, with a notice that the same would be submitted to the Judge to be read and used upon the motion; and the same were received and considered by the Court in determining the motion. *Held*, that this was erroneous, and that additional affidavits could only be received by first obtaining leave of the Court, or upon regular notice of motion, giving the opposite party opportunity to be heard thereon. *Ib.*

ANSWER.

1. An answer to such complaint, admitting the default, and stating that the property at the time of the purchase was worth the agreed price, but had since greatly depreciated in value, that the Defendant was desirous of redeeming the property, and paying the amount due, but that by reason of the great depreciation of the value of said property and the great difficulty that exists in raising moneys and securities in this State, and by reason of the stringency of the times since the payment became due, he could not at this time, nor within a short time raise sufficient moneys to pay off the balance due, and that if an early day is fixed for the foreclosure of his equity of redemption in said property, it will be impossible for him to make such redemption, and he will wholly lose the property, constitutes no defence to the action. *Voss v. De Freudenrich et al.*, 95.

2. Under *Sec.* 51, *page* 537, *Stats. of Minn.*, a Defendant has the same time to answer a complaint after it is served upon him, that he had of unexpired time when he served notice of appearance. *Swift v. Fletcher*, 550.

3. Where the Defendant pleads in time, the Court has no discretion on the question of opening up a judgment entered against him by default. A motion for this purpose is not an appeal to the favor of the Court, but an application for the enforcement of a right; and a denial of it may be reviewed in this Court. Where the answer is not in time, a motion for leave to plead is addressed to the discretion and favor of the Court, and not appealable, unless such discretion is abused. *Ib.*

See "TOWN SITE ACT," "EQUITABLE DEFENCES," "COUNTER CLAIM."

ASSUMPSIT.

1. Assumpsit for use and occupation cannot be supported where the possession is adverse, and the relation of landlord and tenant has never subsisted between the parties; but the Plaintiff must declare in ejectment or trespass. Such a demand could not have been the subject of a set-off to an action upon a note prior to the adoption of the code in 1851. *Folsom v. Carli*, 420.

APPEAL.

1. An order setting aside a stipulation settling the issues to be tried, and allowing an amendment to an answer, is appealable. *Bingham v. Board of Supervisors of Winona County*, 136.

2. *Sec.* 83 *of Chap.* 63 *of the Compiled Statutes, on pages* 592-93, is penal in its nature. Where a Justice of the Peace is sued under that section for not setting up a fee bill in his office, and acquitted, no appeal lies against him. *Kennedy v. Raught*, 235.

3. Upon an appeal from a judgment, the Court may review an order refusing a new trial, made upon motion and case settled. *Mower et als. v. Hanford et als.*, 535.

4. If the case is not properly a part of the record in the Supreme Court, a motion should be made to strike the same from the record; not to dismiss the appeal. If the record improperly presents matters prejudicial to either party, it may be corrected on cause shown. *Ib.*

5. Where the Defendant pleads in time, the Court has no discretion on the question of opening up a judgment entered against him by default. A motion for this purpose is not an appeal to the favor of the Court, but an application for the enforcement of a right; and a denial of it may be reviewed in this Court. Where the answer is not in time, a motion for leave to plead is addressed to the discretion and favor of the Court, and not appealable unless such discretion is abused. *Swift v. Fletcher*, 550.

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6. The granting or refusal of an application for leave to : ropose a case after the time prescribed by statute has expired, is always within the discretion of the Court, and decisions thereon are not appealab'e. Nothing but an abuse of this discretion will justify the interference of this Court. *Irvine v. Meyers & Co.*, 558.

7. It is only in actions tried by jury that it is necessary for the Appellant to make a case. In actions tried by the Court or a Referee, this Court will review the question whether the facts found sustain the conclusions of law, upon the report of the Referee or finding of the Court, without a case embodying them. The statute provides for the preparation of a case within five days after trial before the Court or a Referee, and the trial in such cases must be continued or considered pending until the filing of the decision. *Ib.*

8. A Defendant demurred to a complaint upon two separate reasons or specifications, wherein he claimed the complaint did not state facts sufficient to constitute a cause of action. One of these reasons or specifications the Court held well taken, and the other insufficient. The Defendant then appealed from that part of the order disallowing one of these specifications, claiming the right under *Chap. 25, Sess. Laws of* 1861. *p.* 136. *Held* that the appeal does not lie. It would be unjust to allow an appeal to test the correctness of a decision upon an abstract question, which may ultimately have no bearing upon the case. *The Commonwealth Insurance Company v. Pierro*, 569.

9. Where the return to an appeal is not filed in this Court until too late to permit the giving ten days' notice of argument, as required by Rule XV, of this Court, the rule does not apply. and the Respondent may move a dismissal at any time during the term, upon eight days' notice of motion. *Ib.*

10. Where an appeal is taken, the paper books should in all cases show whether the appeal is from an order or judgment. *Fowler et als. v. Atkinson*, 578.

11. It is only by appeal from the judgment that an abuse of discretion may be reviewed, and not by writ of error, as stated in *Fowler v. Atkinson*, 5 *Minn.*, 505. *Ib.*

APPLICATION.

See "INSURANCE."

ASSIGNMENTS.

1. In cases of voluntary assignments, an unlawful intent appearing on the face of the instrument, vitiates the conveyance. Where the language or provisions of the instrument betray the intent, the proof is deemed conclusive and there is nothing to submit to a jury. Where such is not the case. and the jury find the intent from extrinsic evidence, the result is equally fatal to the validity of the conveyance. The question of fraudulent intent is a mixed question of law and fact: that is, the question of the existence of a certain intent is a question of fact for the jury, (when not disclosed by the papers,) and for the Court to declare whether such intent be fraudulent or otherwise. The fact that the assignee had no knowledge of the fraudulent intent cannot cure the fraud of the assignor. The assignee of an insolvent, accepting the trust, is not a purchaser for a valuable consideration. So, if the jury find that the intent of the assignors at the time of the assignment, was to prevent a forced sale of their property. in order that the business might be continued and the goods sold at retail, the Court should have charged that the deed was void. *Gere v. Murray*, 305.

2. The selection of an incompetent assignee by an insolvent debtor with a design to control the administration of the estate, is a fraud upon the creditors, and will avoid the assignment. But the selection of such an assignee without an improper motive, will not render the assignment void, but only afford reason for the removal of the assignee. and the appointment of a person qualified to execute the trust. *Guerin v. Hunt et al.*, 375.

3. The ignorance of the assignee, in his being unable to read and write, is a badge of fraud, yet by no means conclusive of the fact, and it may be rebutted by proof of business capacity. Proof of solvency or wealth on the part of the assignee would not be admissible to rebut a charge of ignorance. *Ib.*

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4. Where a partnership makes an assignment for the benefit of creditors of the partnership effects, and such assignment is assailed for fraud, it is incompetent to prove that one of the partners had previously disposed of portions of his individual property on a secret trust in his own favor. *Ib.*

5. Where an assignment contains general words of transfer, such as "all" the debtors' estate, and subsequent words of description, or a reference to a schedule as setting it forth particularly, the latter will limit the former, and nothing will pass but what is set forth or specified. *Ib.*

6. On the charge of fraud for the appointment of an incompetent assignee, evidence of how he conducted the business of the assignment, is admissible. *Ib.*

7. The insertion in the schedule of debts of fictitious demands, and giving them preference, is a badge of fraud, but evidence is admissible in explanation and rebuttal of all proof offered to establish a charge of this nature. *Ib.*

8. In an action by creditors to set aside certain deeds of conveyance by the debtors to a third party, upon the ground of fraud, the Plaintiffs offered in evidence a certain deed of assignment for the benefit of creditors, executed by the debtors on the date of the deeds charged to be fraudulent, and also a judgment roll in an action in which certain other creditors of the assignor were Plaintiffs, and the said debtors and their assignee were Defendants, wherein a jury had found said deed of assignment was made with intent to defraud the creditors of said assignors. *Held* that this evidence was inadmissible for the purpose of evidencing the intent with which the deeds, sought to be set aside, were executed, the adjudication in the judgment roll being not only with reference to a different subject matter, but between different parties. *Mower et als. v. Hanford et als.*, 535.

9. A clause in an assignment for the benefit of creditors, authorizing the assignee to sell upon credit, is held to avoid the assignment as a matter of law, although not inconsistent with an actual honest intention on the part of the assignor. *Ib.*

10. Insolvency, concealment of property, appropriating the same to the debtors's own use, and the like circumstances, may be relevant and material evidence to the issue of fraudulent intent, at the time of the execution of certain conveyances to third parties, contemporaneous with a general assignment of property for the benefit of creditors. So, the opposite of these conditions and acts, such as the application of the assignors' available means in discharge of their just debts, for a considerable time previous and up to the very time of the conveyances complained of, may have a tendency to show good faith, and are proper circumstances for the jury to consider in forming their judgment of the intent of the transaction. *Ib.*

11. Where several deeds of conveyance to different parties, and a deed of assignment to another party, were in process of preparation at the same time, and executed upon the same day, there is no conclusion of law that the deeds were all one act, and part of the same transaction. It was a question of fact for the jury. And, where such conveyances were executed by two Defendants, who were co-partners, and the Court charged the jury, that if they found that if either of the Defendants in making any one of the deeds, intended to hinder, delay or defraud the creditors of the firm, then all the deeds were void as to such creditors. *Held* to be error. *Ib.*

ATTACHMENT.

1. The allowance of a warrant of attachment is a judicial act, and *Sec.* 142, *page* 550, *of the Compiled Statutes*, so far as it authorizes clerks of the District Courts to allow warrants of attachment, is in conflict with *Sec.* 1 *of Art.* 6 *of the State Constitution.* *Morrison et als. v. Lovejoy et als.*, 183.

2. An attachment may issue in all actions brought for the recovery of money. *Ib.*

3. An affidavit for an attachment in the District Court must state facts and circumstances sufficient to satisfy the officer that the case is a proper one under the Statute, for such remedy. *Ib.*

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BONA FIDE PURCHASER.

1. A grantee of land who pays no new consideration, but takes the land in payment of a precedent debt, is not a *bona fide* holder for a valuable consideration, but takes the same subject to all claims and equities that could have been urged against his grantor. *Baze v. Arper*, 220.

2. Judgment creditors (previous to the statute of 1858) are not in equity regarded as *bona fide* purchasers, and entitled to the consideration which equity gives them, when they become such without notice, for a valuable consideration actually paid; but they are looked upon simply as proceeding *in invitum* to enforce their legal demands, and are not entitled to the same favor as a purchaser, whose right may be enforced through the conscience of the other party. *Banning et als. v. Edes*, 402.

3. Where there are judgments against, and in favor of each party to an action, rendered upon different trials thereof, the assignee of one of the judgments cannot escape having had notice of the judgment against his assignor at the time he took the assignment, the judgment being in the same action, upon a retrial upon the same record. And having such notice, he takes the judgment assigned, subject to the equitable right of the debtors therein, to have their judgment set off against it. *Irvine et als. v. Myers & Co.*, 562.

BOND.

See "REPLEVIN," "BOND FOR DEED."

BOND FOR DEED.

1. A complaint setting forth that the Plaintiff had executed, acknowledged and delivered to the obligee a bond, conditioned for the conveyance of certain real estate therein specified, upon being paid a certain amount of money; that said bond had been duly recorded; that default had been made by the obligee in making payment according to the terms of the contract, alleging that the obligor had performed on his part all that was required by the terms of the contract, and tendering the deed in Court and asking that the Defendant be required to pay the balance due and accept the deed, at or before a time certain to be fixed by the Court, or in default thereof, that the bond be delivered up to be cancelled, and the Defendant thereafter be barred of all right, title and interest in and to the premises, states a good cause of action. *Dahl et als. v. Provs*, 89.

2. Courts of Equity have ordinarily construed such an instrument as an agreement to convey lands. It is not a mortgage, and differs widely from that instrument. In case of a bond for a deed, no sale of the premises is provided for in the instrument, or contemplated by the parties in case of default by either. If the obligor refuses to convey upon being paid according to the conditions specified, the obligee has his remedy upon the bond, or, perhaps, may have the aid of the Court for a specific performance, or a decree for the conveyance. If the obligee fail, the obligor has his remedy upon such evidences of debt as he may have received, or to have the bond cancelled. Upon such default the obligee can claim no rights, legal or equitable, and the bond is *functus officio*. *Ib.*

3. Such a bond, however, properly witnessed and acknowledged, and recorded, creates a lien upon the land, and is notice to purchasers of any equities the obligee may be able to set up against the obligor. And as a Court of Equity will sometimes interfere to relieve against a default, the existence of the bond casts a cloud or shadow upon the obligor's title, which he is entitled to have removed. *Ib.*

4. The obligee in such a bond is not entitled to a tender of a deed until payments are made in accordance with its conditions. *Ib.*

5. A complaint, setting forth that the Plaintiff had executed, acknowledged and delivered to the obligee, a bond conditioned for the conveyance of certain real estate therein specified, upon being paid a certain amount of money, that said bond had been duly recorded, that default had been made by the obligee in making payment according to the terms of the contract, alleging that the obligor had performed on his part all that was required by the terms of the con-

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tract, and tendering the deed in Court and asking that the Defendant be required to pay the balance due and accept the deed, at or before a time certain to be fixed by the Court, or in default thereof, that the bond be delivered up to be cancelled, and the Defendant thereafter be barred of all right, title and interest in and to the premises, states a good cause of action. *Voss v. De Freudenrich et al.*, 95.

6. An answer to such complaint, admitting the default, and stating that the property at the time of the purchase was worth the agreed price, but had since greatly depreciated in value, that the Defendant was desirous of redeeming the property, and paying the amount due, but that by reason of the great depreciation of the value of said property and the great difficulty that exists in raising moneys and securities in this State, and by reason of the stringency of the times since the payment became due, he could not at this time, nor within a short time raise sufficient moneys to pay off the balance due, and that if an early day is fixed for the foreclosure of his equity of redemption in said property, it will be impossible for him to make such redemption, and he will wholly lose the property, constitutes no defence to the action. *Ib.*

7. In considering the relief to which the Plaintiff is entitled, regard may properly be had, to the amount agreed to be paid by the Defendant for the land which he contracted to purchase, the amount which he has actually paid, and the time which has elapsed since forfeiture. Where the amount of the purchase money is considerable, and the Defendant has paid the larger portion of the same, it is equitable that he should have more time granted to save an entire loss of the land or sum paid than where he has advanced but a small part of the agreed price. *Ib.*

CASE.

1. The granting or refusal of an application for leave to propose a case after the time prescribed by statute has expired, is always within the discretion of the Court, and decisions thereon are not appealable. Nothing but an abuse of this discretion will justify the interference of this Court. *Irvine v. Myers & Co.*, 558.

2. It is only in actions tried by jury that it is necessary for the Appellant to make a case. In actions tried by the Court or a referee, this Court will review the question whether the facts found sustain the conclusions of law, upon the report of the referee or finding of the Court, without a case embodying them. The statute provides for the preparation of a case within five days after trial before the Court or a referee, and the trial in such cases must be continued or considered pending until the filing of the decision. *Ib.*

CERTIFICATE OF SALE.

See "SHERIFF."

CHARTER.

See "RAILROAD CHARTER."

CHARGE TO JURY.

See "Jury."

COLLATERAL SECURITY.

1. The deposit of title deeds of land, with a creditor, as security for a debt, even if accompanied with a writing stating the object of the deposit, will create no estate in the land in favor of the creditor, but merely gives him a lien on the deeds The English doctrine upon the subject repudiated, as having been founded in acknowledged error. *Gardner v. McClure et al.*, 250.

COMPLAINT.

1. The Plaintiff sued by his initial letters, and not his full name. *Held* bad practice, that may vitiate a judgment as against a purchaser of land, upon which it would otherwise be a lien, but that the defect cannot be reached by demurrer. *Gardner v. McClure et al.*, 250.

2. A decree for a divorce cannot be made upon the admission of the facts charged in the complaint. They must be substantiated by proof, and the proof must be that of witnesses other than the parties to the record. *True v. True.*, 458.

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3. A complaint in ejectment alleged that Plaintiffs were the absolute owners in fee of the land; that the Defendant was in the actual possession thereof; that Plaintiffs had demanded in writing of the Defendant that he surrender possession thereof to them; that he had refused to do so, and that he wrongfully and unlawfully withheld possession. These facts were sufficient to entitle the Plaintiffs to recover. *Wells et al v. Masterson*, 566.

4. A complaint for balance due for work and labor stated,—that there was a written contract between the Plaintiff and Defendant—that under and by virtue of such contract Plaintiff performed work and labor, within certain times, on certain sections of the Minneapolis and Cedar Valley Railroad, naming the time and sections—the value of the labor performed—the amount paid, and the balance unpaid, with a proper demand for judgment for the balance. *Held* to be good. The Defendants might take issue upon the contract or the performance thereof, or set up such other defence as they might have had. *Nash & McGrorty v. Murnan & Grace*, 577.

See "ACTION." 3, 10.

CONFLICTING CLAIMS TO REAL ESTATE.

See "ACTION," 4.

CONSTITUTION.

1. Under the State Constitution, the District Court is a court of general jurisdiction, and has original jurisdiction in civil actions, although the amount in controversy may be less than one hundred dollars. *Agin v. Heyward*, 110.

2. The District Court has original jurisdiction in every case where the Constitution itself does not clearly confer it on some other court. This jurisdiction extends to all causes which the Legislature may, in its discretion, authorize other courts to take cognizance of, because the discretion may never be exercised, or not to the extent authorized, and it is necessary, in the meantime, for some Court to have the jurisdiction. The authority possessed by the Legislature, to confer on other courts a portion of the jurisdiction vested by the Constitution in the District Court, does not imply the right to deprive the latter of such jurisdiction, but simply to authorize other courts to exercise it, concurrently with the District Court, in such cases. *Ib.*

3 The allowance of a warrant of attachment is a judicial act, and *sec.* 142, *p.* 550 *of the Comp. Stats.*, so far as it authorizes clerks of the District Courts to allow warrants of attachment, is in conflict with *sec.* 1 *of art.* 6 *of the State Constitution. Morrison et als. v. Lovejoy et al.*, 183.

4. The Act of March 18, 1858, *Stat. of Minn.*, *p.* 111-12, providing the manner in which the county seat of a county may be changed, is unconstitutional, and in conflict with *art* 11. *sec.* 1, *of the State Constitution.* The Legislature must in every case of a change of county lines in counties already organized, or for removing a county seat, pass a special act to take effect upon its adoption by the electors of the county, &c., at the next general election after its passage. *Atwater, J., dissents. Roos v. Swenson*, 428.

5. Under the State Constitution the District Court has original jurisdiction in all cases, whatever the amount involved, except over "estates of deceased persons, and persons under guardianship." *Fowler et als. v. Atkinson*, 503.

6. The act of March 8, 1860, (*Sess. Laws of* 1860, *p.* 216.) was designed to compel parties whose demands were secured in the manner stated in the act, to proceed first to exhaust their securities, before bringing suit upon the original claim. The assertion of this power by the Legislature is not unconstitutional. But the second section of the act, so far as it permits an election with the creditor whether he will sue or not, is in conflict with the first section, and also with the spirit of the act; and so far as it provides for the release and discharge of securities as a consequence of bringing suit, it is in conflict with the Constitution of the United States, and of this State. *Swift v. Fletcher*, 550.

CONSTRUCTION OF STATUTES.

1. Where, as in this State, the statute prescribes the manner in which only a conveyance of real property by deed can be made, any attempt to convey with-

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out complying with the requisites of the statutes must be treated as a nullity; and the Legislature could not give it validity so as to affect persons who may have subsequently acquired title to the property, without divesting them of rights which they had legally acquired. *Meighen et al. v. Strong*, 177.

2. The allowance of a warrant of attachment is a judicial act, and *sec.* 142, *p.* 550 *of the Comp. Stats.*, so far as it authorizes clerks of the District Courts to allow warrants of attachment, is in conflict with *sec* 1 *of art* 6 *of the State Constitution*. *Morrison et als. v. Lovejoy et als.*, 183.

3. Previous to March 6th, 1852, Judges of Probate had no power to take the acknowledgment of conveyances of real estate. Subsequent to the last mentioned date they had such power. *R. S., p.* 211, *sec.* 8; *Comp. Stats.*, 495. *Baze v. Arper*, 220.

4. It is not necessary that official certificates of acknowledgment should be under seal unless the statute authorizing them expressly require it. If the certificate styles the officer taking it as an officer authorized by statute to perform the act, it will be *prima facie* evidence of his official character. No seal is required by our act in 1852. *Ib.*

5. The act of 1856, published on *page* 406 *of the Compiled Statutes*, does not comprehend acknowledgments of conveyances taken by Judges of Probate, but such only as were taken before the Clerks of the Supreme, District and Probate Courts. *Ib.*

6. *Sec.* 7, *p.* 595 of the *Comp. Stats.*, only cuts off the common law right that the defeated party in ejectment had to contest the right of possession as often as he saw fit, until arrested by a Court of Chancery. The statute limits this right to two trials, and declares the second judgment final, which means final so far as to bar another action for the same cause, but like all other final judgments it may be reviewed for errors committed on the trial. *Ib.*

7. The record of a conveyance acknowledged before an officer not authorized to take acknowledgments, is no notice to subsequent purchasers, but the deed was good against an attaching creditor until the passage of the act of 1858. *Chap.* 52, *sec.* 1, *General Laws* 1858. *Ib.*

8. *Sec.* 33 *of Chap.* 63 *of the Compiled Statutes, on pages* 592-93, is penal in its nature. Where a Justice of the Peace is sued under that section for not setting up a fee bill in his office, and acquitted, no appeal lies against him. *Kennedy v. Raught*, 235.

9. The section is limited in its operation to officers in, and to come into office, within six months after its passage. *Ib.*

10. Under the act of March 8, 1860, *Laws of* 1860, *p.* 216, a party who has taken security for a debt in any of the ways enumerated in the act, cannot maintain an action upon the debt until he has first exhausted his securities. But where he takes an assignment of what he supposes to be a valuable interest in property, as security, and afterwards discovers that it is of no value, he is not driven to a fruitless effort to realize upon the pretended security in the first instance, but may at once commence his action upon the original debt, and if the existence of the security is pleaded in abatement of the suit, he may allege in reply that the security was valueless, and in fact no security, and upon establishing such fact upon the trial, he may have a judgment for the original demand. *Schalck et als. v. Harmon et als*, 265.

11. The certificate of acknowledgment to a deed or mortgage need not be under seal, unless the statute authorizing the officer to take it expressly requires it. If the certificate styles the officer taking it as an officer authorized by law to perform the act, it will be *prima facie* evidence of his official character. The Statutes of this State in force in 1854, did not require a seal to such certificates. *Thompson et als. v. Morgan*, 292.

12. The act of the Legislature of July 26, 1858. (*Comp. Stats.*, 403 4.) does not affect any rights that were vested prior to its passage. The Legislature may perhaps have power to cure irregularities in conveyances between the parties to them, and all persons who take subsequent to the cure being wrought, but it cannot disturb vested rights. *Ib.*

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13. The counter claim authorized by the second subdivision of *sec.* 71. *p.* 541, of the *Comp. Stats.*, extends to all claims for damages arising *ex contractu*, and existing at the commencement of the action, whether such damages are liquidated or unliquidated. *Morrison et als. v. Lovejoy et als.*, 319.

14 The Statute, pages 382-83-84, although designed to do away with some trusts that would otherwise result, was not intended to cut off trusts in favor of a partnership, where the lands are conveyed to the individual members of the firm as tenants in common. Nor does the recognition of such a trust conflict in any manner with the statute of frauds. Such a trust, while it will be enforced against a purchaser or mortgagee, from one of the co-partners or his representatives, who has notice, actual or constructive, that the land is partnership property, cannot be enforced against a *bona fide* purchaser or mortgagee without such notice. *Arnold et als. v. Wainwright*, 358.

15. The word "obligation," in subdivision two, of section seventy-one, page 541, of *Stat of Minn*, was intended to apply to all matters arising *ex contractu;* but any claim that would not have been the proper subject of set off before the adoption of the Code, does not fall within the provisions of said subdivision two. *Folsom v. Carli*, 420.

16. The act of March 18, 1858, *Stat. of Minn., p.* 111 12, providing the manner in which the county seat of a county may be changed, is unconstitutional, and in conflict with *art* 11, *sec* 1, *of the State Constitution.* The Legislature must in every case of a change of county lines in counties already organized, or for removing a county seat, pass a special act to take effect upon its adoption by the electors of the county, &c., at the next general election after its passage. *Atwater, J., dissents. Roos v. Swenson*, 428.

17. Under the act of March 5, 1853, *Stats. of Minn.. p.* 480, a defendant in any civil action is expressly required to interpose all equities, claims and demands existing in his favor at the time of the commencement of the action, or intervening before a final decision, by way of answer, or supplemental answer, in the nature of a counter claim. If not so interposed in the original action, they cannot be set up, asserted or enforced by another action. *Fowler et al. v. Atkinson*, 503.

18. Under *Sec.* 51, *page* 537, *Stats. of Minn.*, a Defendant has the same time to answer a complaint after it is served upon him. that he had of unexpired time when he served notice of appearance. *Swift v. Fletcher*, 550.

19. The counter claim contemplated by the Statute (*p* 541, *sec.* 7; *Ib. p.* 554, *sec.* 170.) must be one upon which an action can be maintained by the Defendant at law or in equity. *Ib.*

20. The act of March 8, 1860, (*Sess. Laws of* 1860, *p.* 216,) was designed to compel parties whose demands were secured in the manner stated in the act, to proceed first to exhaust their securities, before bringing suit upon the original claim. The assertion of this power by the Legislature is not unconstitutional. But the second section of the act, so far as it permits an election with the creditor whether he will sue or not, is in conflict with the first section, and also with the spirit of the act; and so far as it provides for the release and discharge of securities as a consequence of bringing suit, it is in conflict with the Constitution of the United States, and of this State.

21. The issuance of a writ of error and putting in bail did not operate as a *supersedeas*, or even stay of execution which had been levied before the issuance of the writ, but the sheriff could proceed to a sale as if no writ of error had been sued out. Our statute (*Stat. of Minn*, *p.* 623-24, *sec.* 25) provides a stay of execution in case of writ of error and bond, but the stay does not supersede the execution so as to annul what has been done under it; it simply checks the sheriff from proceeding further. The Sheriff may retain the property levied upon until the decision of the Court above, or the order of the Court. *The North Western Express Company v. Landes*, 564.

CONSTRUCTION OF CONTRACTS.

See "CONTRACT."

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CONTRACT.

1. Where a written executory contract specifies the time during which such contract is to continue, the time is material; and it cannot be shown by parol, contrary to the terms thereof, that in a certain contingency the contract was to be determined prior to the time therein specified. *Morison et als. v. Lovejoy et al.*, 319.

2. Under the written executory contract for the manufacture of lumber at certain mills, during a given term, at a specified price per thousand feet, one party agreed to furnish logs for manufacturing to the full capacity of the mills, during the continuance of the contract, and the other party to employ the mills exclusively for the party furnishing, during said term; but before the expiration of the term the former refused to furnish, or to proceed further under the contract. *Held*, in an action by the manufacturer, that he could not treat the contract as continuing after such breach, and recover the contract price for the lumber which he could have manufactured under said contract up to any specified time, without averring and proving a continuing readiness and ability to perform on his part. That he might however treat the contract as terminated and sue at once for the damage sustained by such breach. That in such a case his damages would be measured by the value of the contract to him at the time of the breach. And that the value of such a contract depended upon the profits which the manufacturer would have realized therefrom had it been continued and faithfully performed during the term. But that in estimating such profits the rent, or value of the use of the mills and necessary machinery, should be taken into the account as a part of the cost of manufacturing.—*Ib.*

3. When the basis of the transaction between the parties is a contract, and the breach of the contract amounts to a trespass, or entitles the injured party to an action for negligence, or fraud, or otherwise, in the nature of an action *ex delicto*, he is not deprived of his right to set off such a claim, or a claim arising on contract may be set off against such a cause of action. In all such cases there is a contract between the parties, in fact, and the wrong doer is not allowed to deprive the injured party of the advantage of it, by having tortiously violated it.—*Folsom v. Carli*, 420.

See "DEED," "INSURANCE," "BOND FOR DEED," "STIPULATION," "PARTNERSHIP," "EVIDENCE," "AGENCY," "PAYMENT," "PROMISSORY NOTE."

COSTS.

1. In cases where a new trial is awarded for error committed by the Judge, the costs of the irregular trial should abide the event of the suit, and be recoverable by the party who ultimately succeeds. *Walker v Barron*, 508.

COUNTER CLAIM.

1. The counter-claim authorized by the *second subdivision of section* 71, *page* 541, *of the Compiled Statutes*, extends to all claims for damages arising *ex contractu*, and existing at the commencement of the action, whether such damages are liquidated or unliquidated. *Morrison et als. v. Lovejoy et al.*, 319.

2. The word "obligation," in subdivision two of section seventy-one, page 541 of *Stat. of Minn.*, was intended to apply to all matters arising *ex contractu*; but any claim that would not have been the proper subject of set off before the adoption of the Code, does not fall within the provisions of said subdivision two. *Folsom v. Carli*, 420.

3. When the basis of the transaction between the parties is a contract, and the breach of the contract amounts to a trespass, or entitles the injured party to an action for negligence, or fraud, or otherwise, in the nature of an action *ex delicto*, he is not deprived of his right to set off such a claim, or a claim arising on contract may be set off against such a cause of action. In all such cases there is a contract between the parties, in fact, and the wrong-doer is not allowed to deprive the injured party of the advantage of it, by having tortiously violated it. *Ib.*

4. Action for rent of land. Defendant pleaded as a counter-claim a demand against the Plaintiff for contribution as co-surety with the Defendant on an appeal

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bond, in a matter entirely distinct from the Plaintiff's cause of action, the Defendant having paid the whole amount. Whether such a demand is the proper subject of set off or counter-claim—*doubted*. *Schmidt v. Coulter*, 492.

5. Under the act of March 5, 1853, *Stats. of Minn, p.* 480, a Defendant in any civil action is expressly required to interpose all equities, claims and demands existing in his favor at the time of the commencement of the action, or intervening before a final decision, by way of answer, or supplemental answer, in the nature of a counter claim. If not so interposed in the original action, they cannot be set up, asserted or enforced by another action. *Fowler et al, v. Atkinson*, 503.

6. The counter claim contemplated by the statute (p. 541, sec. 71. Id. p. 554, sec. 170) must be one upon which an action can be maintained by the Defendant at law or in equity. *Swift v. Fletcher*, 550.

COUNTY BONDS.

1. The Board of Supervisors of Carver county issued thirteen bonds of said county to the Chaska Company, for the purpose of negotiation, the proceeds to be used in the erection of a Court House. The Company sold one, and hypothecated four others. In an action by the Company against the county, to recover the value of materials and services in the erection of the Court House. *Held*, that the Plaintiff was not estopped from showing that the bonds were of no value. *Chaska Company v. Board of Supervisors of Carver County*, 204.

2. At the time these bonds were issued, County Commissioners were authorized to issue bonds for the purpose of erecting a Court House and Jail, and the bonds are valid and binding upon the county. *Ib.*

COUNTY SEATS.

1. The act of March 18, 1858, *Stats. of Minn. p.*, 111-12, providing the manner in which the county seat of a county may be changed, is unconstitutional, and in conflict with art. 11, sec. 1 of the *State Constitution*. The Legislature must in every case of a change of county lines, in counties already organized, or for removing a county seat, pass a special act to take effect upon its adoption by the electors of the county, &c., at the next general election after its passage. *Atwater, J., dissents. Roos v. Swenson*, 428.

CRIMINAL LAW.

See "INDICTMENT."

CUSTOM.

1. Proof of particular customs is generally allowed to aid Courts and Juries in arriving at the intentions of parties when they perform acts or make contracts, that are susceptible of more than one meaning. The custom must, however, be so well established in the particular locality, trade, profession or business, to permit its being proved, that all men transacting the business to which it relates, must be presumed to have knowledge of it, and to act and contract with reference to it. It must be shown that the custom existed at the place where, and the time when, the contract or act sought to be affected by it, was made or performed. It is only in exceptional cases that proof of an usage in one place is allowed to show that it existed in another. *Walker v. Barron*, 508.

DAMAGES.

1. The counter claim authorized by the second subdivision of *sec.* 71. *p.* 541, of the *Comp. Stats.*, extends to all claims for damages arising *ex contractu*, and existing at the commencement of the action, whether such damages are liquidated or unliquidated. *Morrison et als. v. Lovejoy et als.*, 319.

DEED.

1. The certificate of a Notary public to the acknowledgment of a deed is not conclusive evidence of the facts certified to by him, but the same may be rebutted by proof *Dodge v. Hollinshead*, 25.

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2. Where a party executes and acknowledges a deed, and afterwards, either by acts or words, expresses his will, that the same is for the use of the grantee, especially where the assent of the grantee appears to the transaction, it shall be sufficient to convey the estate. And this, though the deed remains in the hands of the grantor. *Stevens v. Hatch et al*, 64.

3. No particular form is necessary in order to constitute a good delivery of a deed. This may consist in an act without words, or in words without any act. The main thing which the law requires is, that the mind of the parties should be manifest, the one to deliver, the other to accept the instrument. *Ib.*

4. The record of a deed for the conveyance of lands in this State, executed in the presence of one witness only, cannot be admitted in evidence. *Meighen et al, v. Strong*, 177.

5. Where, as in this State, the statute prescribes the manner in which only a conveyance of real property by deed can be made, any attempt to convey without complying with the requisites of the statutes must be treated as a nullity; and the Legislature could not give it validity so as to affect persons who may have subsequently acquired title to the property, without divesting them of rights which they had legally acquired *Ib.*

6. Previous to March 6th, 1852, Judges of Probate had no power to take the acknowledgment of conveyances of real estate. Subsequent to the last mentioned date they had such power. *R. S., p.* 211, *sec.* 8; *Comp. Stats.*, 495. *Baze v. Arper*, 220.

7. It is not necessary that official certificates of acknowledgment should be under seal unless the statute authorizing them expressly require it. If the certificate styles the officer taking it as an officer authorized by statute to perform the act, it will be *prima facie* evidence of his official character. No seal is required by our act in 1852. *Ib.*

8. The act of 1856, published on *page* 406 *of the Compiled Statutes.* does not comprehend acknowledgments of conveyances taken by Judges of Probate, but such only as were taken before the Clerks of the Supreme, District and Probate Courts. *Ib.*

9. The record of a conveyance acknowledged before an officer not authorized to take acknowledgments, is no notice to subsequent purchasers, but the deed was good against an attaching creditor until the passage of the act of 1858. *Chap.* 52, *sec.* 1, *General Laws* 1858. *Ib.*

10. The deposit of title deeds of land, with a creditor, as security for a debt, even if accompanied with a writing stating the object of the deposit, will create no estate in the land in favor of the creditor, but merely gives him a lien on the deeds. The English doctrine upon the subject repudiated, as having been founded in acknowledged error. *Gardner v. McClure et al.*, 250.

11. A mortgage, executed in the presence of only one witness is ineffectual to pass any interest or estate in the lands described, and is not entitled to record, The record of such mortgage is no notice to any one. *Thompson et als, v. Morgan.* 292.

12. The recital of such a defective mortgage in a deed of the same lands by the mortgagor, merely describing the mortgage and declaring the deed to be subject to it, does not estop the grantee in the conveyance, or those holding under him, from questioning the validity of the mortgage. *Ib.*

13. The certificate of acknowledgment to a deed or mortgage need not be under seal, unless the statute authorizing the officer to take it expressly requires it. If the certificate styles the officer taking it as an officer authorized by law to perform the act, it will be *prima facie* evidence of his official character. The Statutes of this State in force in 1854, did not require a seal to such certificates. *Ib.*

14. The act of the Legislature of July 26, 1858. (*Comp. Stats.*, 403-4.) does not affect any rights that were vested prior to its passage. The Legislature may perhaps have power to cure irregularities in conveyances between the parties to them, and all persons who take subsequent to the cure being wrought, but it cannot disturb vested rights. *Ib.*

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15. P sold to B certain real estate, and executed a deed for the same, which was delivered to a third person, to be held until B should execute a mortgage for part of the purchase money. The mortgage was subsequently executed by B, bearing date several days after the deed, though both were delivered at the same time. Previous to the execution of the deed and mortgage, a judgment had been docketed against B in the same county in which the real estate was situated, and was then unsatisfied. *Held*, That the deed and mortgage were to be considered as parts of one and the same transaction, and that the lien of the mortgage took precedence to that of the judgment. *Banning et als, v. Edes*, 402.

16. The date of a deed or mortgage is only presumptive evidence of the time of delivery, and this presumption may always be rebutted by proof. *Ib.*

17. A vendor taking security upon the land sold, does not, by that act, waive his equitable lien, provided he has expressly agreed with the purchaser that it shall be retained. Where such agreement has been made, the lien will attach to the property in the hands of the vendee, and all persons claiming under him with notice of the agreement. *Daughaday v. Paine et al*, 443.

18. The owner in fee of land, in conveying the same by deed, may limit or restrict the estate granted in any manner he chooses, (not repugnant to the grant intended) and the grantee will take only the estate as limited. *Ib.*

19. Whenever the instruments forming the purchaser's chain of title disclose an incumbrance, he is equally bound by such notice, as by the record of the instrument itself, creating or evidencing the incumbrance, or actual notice of the same, as in case of vendor's lien without mortgage. *Ib.*

20. A purchaser who relies upon an abstract of title, which does not exhibit the contents of the conveyances forming the chain of title, will be deemed guilty of *crassa negligentia*, and the fact that such is the usual custom of the country in the transfer of real estate, raises no equity in his favor. *Ib.*

See "ASSIGNMENT," "BOND FOR DEED."

DEPOSITE OF TITLE DEEDS.

See "DEED."

DELIVERY.

See "DEED," "PROMISSORY NOTE."

DISTRICT COURT.

1. Under the State Constitution, the District Court is a court of general jurisdiction, and has original jurisdiction in civil actions, although the amount in controversy may be less than one hundred dollars. *Agin v. Heyward*, 110.

2. The District Court has original jurisdiction in every case where the Constitution itself does not clearly confer it on some other court. This jurisdiction extends to all causes which the Legislature may, in its discretion, authorize other courts to take cognizance of, because the discretion may never be exercised, or not to the extent authorized, and it is necessary, in the meantime, for some Court to have the jurisdiction. The authority possessed by the Legislature, to confer on other courts a portion of the jurisdiction vested by the Constitution in the District Court, does not imply the right to deprive the latter of such jurisdiction, but simply to authorize other courts to exercise it, concurrently with the District Court, in such cases. *Ib.*

3. The District Court has jurisdiction to try all actions against a county. *Bingham vs. the Board of Supervisors of Winona County*, 136.

4. Since the organization of the State government, the District Courts are Courts of general jurisdiction, and may entertain all cases, jurisdiction of which is not conferred upon some other Court by the Constitution, or some statute. The case of *Castner & Hinckley vs. Chandler & Green*, 2 *M. R.* 86, was decided under the Territorial Government, and is not authority since the Constitution. (See *Agin v Hayward, ante, p.* 110.) *The Southern Minnesota Railroad Company v Stoddard*, 150.

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5. Where a jury retire in the evening, and the Court adjourns before they agree, the Judge cannot meet the jury in the absence of the parties and receive their verdict out of Court, discharge the jury and render the verdict himself on the opening of the Court, the following day. Such a proceeding is irregular. *Kennedy v. Raught*, 235.

6. Under the State Constitution the District Court has original jurisdiction in all cases, whatever the amount involved, except over "estates of deceased persons, and persons under guardianship." *Fowler v. Atkinson*, 503.

7. Where the original papers are used upon a motion relating to the record in a cause, the Court may take judicial notice of the Clerk's signature to the file marks, although they may be from another District. But the records should never be allowed to leave the clerk's office for any purpose, without an order from the Court. Exemplifications of the records, and also sworn copies, properly examined and compared, and the affidavits of parties familiar with the facts upon which the questions arise, are always competent evidence in such motions. *Sherrerd v. Frazer et als*, 572.

8. The District Court has not power to compel a party to enter a judgment in an action, or to do any other affirmative act in the progress of a cause, which relates merely to the conduct of the same. Where the duty is clear and the other party is interested in its performance, the Court may always command it to be done under the penalty of being turned out of Court, if it is the Plaintiff, and of allowing the Plaintiff to proceed to judgment, if it is the Defendant who disobeys. If a Defendant obtains a verdict or other decision in a cause which requires to be perfected in judgment before an appeal or writ of error can be taken, and refuses to pursue it further, the Plaintiff, if he desires a review, may obtain an order that the Defendant perfect it, or that it be vacated and his defence stricken out, or the Court may impose any similar appropriate and effective penalty to compel obedience. (*The Syllabus in Duel v. Hawke*, 2 *Minn.* 50, *corrected.*) *Ib.*

DIVORCE.

1. A decree for a divorce cannot be made upon the admission of the facts charged in the complaint. They must be substantiated by proof, and the proof must be that of witnesses other than the parties to the record. *True v. True.*, 458.

2. When a decree for a divorce is assailed for fraud used in obtaining the same, and the fraud is clearly made out, the decree may be vacated. *Ib.*

EJECTMENT.

1. *Sec.* 7, *p.* 595 of the *Comp. Stats.*, only cuts off the common law right that the defeated party in ejectment had to contest the right of possession as often as he saw fit, until arrested by a Court of Chancery. The statute limits this right to two trials, and declares the second judgment final, which means final so far as to bar another action for the same cause, but like all other final judgments it may be reviewed for errors committed on the trial. *Baze v. Arper*, 220.

2. Assumpsit for use and occupation cannot be supported where the possession is adverse, and the relation of landlord and tenant has never subsisted between the parties; but the Plaintiff must declare in ejectment or trespass. Such a demand could not have been the subject of a set-off to an action upon a note prior to the adoption of the code in 1851. *Folsom v. Carli*, 420.

3. A complaint in ejectment alleged that Plaintiffs were the absolute owners in fee of the land; that the Defendant was in the actual possession thereof; that Plaintiffs had demanded in writing of the Defendant that he surrender possession thereof to them; that he had refused to do so, and that he wrongfully and unlawfully withheld possession. These facts were sufficient to entitle the Plaintiffs to recover. *Wells et al. v. Masterson*, 566.

ENDORSER.

1. An endorser of a secured note may, under the above act, compel the holder to exhaust the security before resorting to him. *Swift v. Fletcher*, 559.

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EQUITY.

1. A Sheriff having attached certain real property of the judgment debtor, proceeds to sell on execution, but advertises and sells under an erroneous description, intending however to sell the property attached. The judgment creditor purchases at the sale. in the belief that he is purchasing the property attached, and wholly ignorant of the error in the description. It afterwards appears that the judgment debtor has no manner of title or claim to the property as described in the advertisement and certificate of sale. *Held*, that a Court of Equity will relieve from the mistake. *Lay et als. v. Shaubhut et al.*, 273.

2. The real estate of a partnership is in equity treated as mere personalty, and governed by the rules and doctrines applicable to that species of property. *Arnold et als. v. Wainwright*, 358.

3. Lands may be converted into partnership stock by parol agreement of the partners, or by such facts and circumstances attending its acquisition or use, as will raise an implication that the partners so intended. The legal estate will be controlled by the terms of the conveyance, but equity will subject the lands to the same liabilities imposed upon other partnership estate, and restrict the partners to the same extent in their disposition of them as obtains in regard to the personalty. *Ib.*

See "BOND FOR DEED."

EQUITABLE DEFENCES.

1. Under the act of March 5, 1853. *Stats. of Minn., p.* 480, a defendant in any civil action is expressly required to interpose all equities, claims and demands existing in his favor at the time of the commencement of the action, or intervening before a final decision, by way of answer, or supplemental answer, in the nature of a counter claim. If not so interposed in the original action, they cannot be set up, asserted or enforced by another action. *Fowler et al. v. Atkinson*, 503.

2. A Justice of the Peace has nothing to do with actions or defences of a purely equitable nature. If a party is sued before a Justice, and has a good defence to the action in equity, he may appeal to the District Court, and interpose his equities by way of answer, as if the action were originally commenced there. The refusal of that Court to allow time to interpose his equities does not confer upon him the right to make them the subject of another action. *Ib.*

EQUITABLE MORTGAGE.

1. The deposit of title deeds of land, with a creditor, as security for a debt, even if accompanied with a writing stating the object of the deposit, will create no estate in the land in favor of the creditor, but merely gives him a lien on the deeds. The English doctrine upon the subject repudiated, as having been founded in acknowledged error. *Gardner v. McClure et al.*, 250.

2. A vendor taking security upon the land sold, does not, by that act, waive his equitable lien, provided he has expressly agreed with the purchaser that it shall be retained. Where such agreement has been made, the lien will attach to the property in the hands of the vendee, and all persons claiming under him with notice of the agreement. *Daughaday v. Paine et al.*, 443.

3. Whenever the instruments forming the purchaser's chain of title, disclose an incumbrance, he is equally bound by such notice, as by the record of the instrument itself, creating or evidencing the incumbrance, or actual notice of the same, as in case of vendor's lien without mortgage. *Ib.*

ERROR.

See "EJECTMENT," 1.

ESTOPPEL.

1. The Board of Supervisors of Carver County issued thirteen bonds of said county to the Chaska Company, for the purpose of negotiation, the proceeds to

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be used in the erection of a Court House The Company sold one and hypothecated four others In an action by the Company against the county, to recover the value of materials and services in the erection of the Court House, *Held* that the Plaintiff was not estopped from showing that the bonds were of no value. *Chaska Company v. Board of Supervisors of Carver County*, 204.

2. A mortgage executed in the presence of only one witness is ineffectual to pass any interest or estate in the lands described, and is not entitled to record. The record of such a mortgage is no notice to any one. *Thompson et als. v. Morgan*, 292.

3. The recital of such a defective mortgage in a deed of the same lands by the mortgagor, merely describing the mortgage and declaring the deed to be subject to it, does not estop the grantee in the conveyance, or those holding under him, from questioning the validity of the mortgage. *Ib.*

4. C. gave his promissory note to F. F., after the note matured, and after it had been paid in full, transferred it, with other notes, to W, as collateral security for money borrowed, and then informed C. of what he had done, but desired him not to let W. know that the note had been paid, and he would take it up in a short time. W. afterwards notified C. that the note was in his possession, and that payment must be made to him alone. C. then stated to W. that a particular sum. or thereabouts, had been paid on the note, but did not inform him that it had been paid in full. W. kept the note in his possession for some two years or more. He then settled with F. for the loan, taking a new note for the balance still due, and retaining the same collaterals. He subsequently informed C. that he still had his note. *Held*, that, in an action by W. to recover on the note given by C., C. was not estopped from proving that it had been paid in full at the time it was transferred to the Plaintiff. *Whitacre v. Culver*, 297.

EVIDENCE.

1. The certificate of a notary public to the acknowledgment of a deed is not conclusive evidence of the facts certified to by him, but the same may be rebutted by proof. *Dodge v. Hollinshead*, 25.

2. Where a question of fact has been submitted to a Court or Jury, and evidence touching the same has been received on the part of both Plaintiff and Defendant, the finding will not be disturbed on the ground that it is contrary to the weight of evidence, nor unless it is manifestly contrary to the evidence. *Dixon v. Merrill et als.*, 160.

3. Where evidence has been received in the Court below without objection, it is too late to raise the question of its admissibility in this Court. *Ib.*

4. The ignorance of the assignee, in his being unable to read and write, is a badge of fraud, yet by no means conclusive of the fact, and it may be rebutted by proof of business capacity. Proof of solvency or wealth on the part of the assignee would not be admissible to rebut a charge of ignorance. *Guerin v. Hunt et al.*, 375.

5. Where a partnership makes an assignment for the benefit of creditors of the partnership effects, and such assignment is assailed for fraud, it is incompetent to prove that one of the partners had previously disposed of portions of his individual property on a secret trust in his own favor. *Ib.*

6. On a charge of fraud for the appointment of an incompetent assignee, evidence of how he conducted the business of the assignment, is admissible. *Ib.*

7. Parol proof of the contents of a letter cannot be given until the absence of the letter is satisfactorily accounted for. *Ib.*

8. The date of a deed or mortgage is only presumptive evidence of the time of delivery, and this presumption may always be rebutted by proof. *Banning et als. v. Edes*, 402.

9. A decree for a divorce cannot be made upon the admission of the facts charged in the complaint. They must be substantiated by proof, and the proof must be that of witnesses other than the parties to the record. *True v. True*, 458.

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10. The taking the note or security of a person, other than the debtor, is not *prima facie* evidence that the same was taken in payment of a precedent debt. There must be evidence of an express agreement to take such note in payment, in order to give it that effect, and the burden of proof is upon the debtor to show such agreement. But the rule seems to be different where a commercial instrument is given in payment of a contemporaneous sale, and the vendee is not liable on the instrument. In such case the presumption of law is that the vendee is not liable on the original indebtedness; but the acceptance by a vendor of goods, at the time of the sale, of a draft drawn by the vendee upon a stranger, and accepted by him, is not *prima facie* evidence that the same was taken as absolute payment of the purchase money. The question is one of fact for the jury to determine. *Devlin et als. v. Chamblin et als*, 468.

11. Although a mere receipt acknowledging payment of money may be varied or contradicted by parol, yet where it contains an agreement, condition or stipulation between the parties, it is in the nature of a contract, and is not liable to be varied by parol. So where a bill of sale named the vendee as J. W. S., agent for J. G. S., it was improper to admit parol proof that the sale was to J. G. S. *Sencerbox v. McGrade*, 484.

12. When a party states that he "was acting as agent for his brother," in a certain transaction, *non constat*, but that he might have been so acting on his own assumption and without any authority; neither the declarations of a party, nor his acts, can be given in evidence to prove that he is the agent of another. *Ib.*

13. Certain bankers gave their written receipt for money, "to be loaned out. We to account to the owner for principal and interest, less our charges, &c., not to exceed 2½ per cent. per annum." This contract created between the parties the relation of principal, and broker or agent. The agents were only limited in their conduct to the observance of good faith, and the exercise of proper care and circumspection. If they acted in good faith and loaned the money to a party solvent at the time of the loan, they are protected, notwithstanding such party subsequently became insolvent. Parol evidence, tending to show that the money was to be loaned for a period of six months from the time of its receipt, and that the brokers were to be liable for the amount and interest, would be in direct conflict with the terms of the receipt, and could not be received to contradict its written terms. *Wykoff v. Irvine et als.*, 496.

14. Proof of particular customs is generally allowed to aid Courts and Juries in arriving at the intentions of parties, when they perform acts or make contracts that are susceptible of more than one meaning. The custom must, however, be so well established in the particular locality, trade profession or business, to permit its being proved, that all men transacting the business to which it relates, must be presumed to have knowledge of it, and to act and contract with reference to it. It must be shown that the custom existed at the place where, and the time when, the contract or act sought to be affected by it, was made or performed. It is only in exceptional cases that proof of an usage in one place is allowed to show that it existed in another. *Walker v. Barron*, 508.

15. A new trial will not be granted upon the ground of newly discovered evidence upon an affidavit stating that affiant is informed and believes that certain parties will testify in a certain manner, if a new trial is granted. The affidavits of the witnesses should be produced when they can be obtained, and there should appear a sufficient excuse for not producing the testimony on the former trial. *Keough v. McNitt*, 513.

16. Parol evidence is admissible in cases of written instruments, to prove collateral and independent facts about which the writing is silent; but not to vary the terms of the instrument. *Ib.*

17. It may always be shown in defence to an action on a note in the hands of original parties, that it never was perfected by delivery, or that there was no consideration moving between the parties to support it. *Ruggles et als. v. Swanwick et al.*, 526.

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18. When any contract between parties is reduced to writing, it must be proven by the writing, and cannot be varied by any previous or contemporaneous verbal agreements or understandings; but where there is a direct reference in the writing, to a verbal agreement, the latter may be proved even though the effect of it be to add material terms and conditions to the writing. *Ib.*

19. Where a writing evidently appears to express only some part of an agreement entered into between the parties, it seems it would be admissible to prove the other parts of the agreement on which it is silent. *Ib.*

20. Where the original papers are used upon a motion relating to the record in a cause, the Court may take judicial notice of the Clerk's signature to the file marks, although they may be from another District. But the records should never be allowed to leave the clerk's office for any purpose without an order from the Court. Exemplifications of the records, and also sworn copies properly examined and compared, and the affidavits of parties familiar with the facts upon which the questions arise, are always competent evidence in such motions. *Sherrerd v. Frazer et als.*, 572.

21. The District Court has not power to compel a party to enter a judgment in an action, or to do any other affirmative act in the progress of a cause, which relates merely to the conduct of the same. Where the duty is clear and the other party is interested in its performance, the Court may always command it to be done under the penalty of being turned out of Court, if it is the Plaintiff. and of allowing the Plaintiff to proceed to judgment, if it is the Defendant who disobeys. If a Defendant obtains a verdict or other decision in a cause which requires to be perfected in judgment before an appeal or writ of error can be taken, and refuses to pursue it farther, the Plaintiff, if he desires a review, may obtain an order that the Defendant perfect it, or that it be vacated and his defence stricken out, or the Court may impose any similar appropriate and effective penalty to compel obedience. *The Syllabus in Duel vs. Hawke*, 2 *Minn. R.* 50, *corrected. Ib.*

See "ASSIGNMENT."

FRAUD, AND FRAUDULENT CONVEYANCNS AND CONTRACTS.

See "ASSIGNMENT," "DIVORCE."

INDICTMENT.

1. An indictment for rape charging that A. B. on &c., "in the county of Wright, did feloniously ravish and forcibly and against her will carnally know one C. D., a woman of the age of ten years and upwards, against the peace and dignity of the State," is sufficient. *O'Connell v. State of Minnesota*, 279.

2. It is not necessary to allege the crime to have been committed at any particular place within the county named, nor that the words "forcibly and against her will" should follow the word ravish; the latter is the essential word, and imports not only force and violence on the part of the man, but resistance on the part of the woman—nor is it essential to charge an assault in terms. The statute authorizes the jury to convict for an assault with intent to commit a rape, on the trial of such an indictment, and, upon such conviction, the punishment is prescribed by *sec.* 40 *of chap.* 89, *Comp. Stat.*, 706. *Ib.*

3. An indictment for rape should not conclude *contra formam statuti. Ib.*

INSTRUCTIONS TO JURY.

See "JURY."

INSURANCE.

1. Where it is stipulated in a policy of insurance against fire, that the same is made and accepted in reference to conditions annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties, and one of the conditions is, that if the policy is made and issued upon a survey and

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description of the property insured, such survey and description shall be taken and deemed to be a part and portion of such policy and warranty on the part of the assured. *Held*, that a written application signed by the assured containing a survey and description of the property, was a warranty of the truth of such survey and description, and not a mere representation, and that if the survey and description were false, no recovery could be had upon the policy; that in case of warranty the parties stipulate the materiality of the matter warranted, and cut off all inquiry concerning it; it must be true or there is no contract; that a representation may be untrue and a recovery be had upon the policy, if its falsity is not material to the risk, which is always open to enquiry. But where the application contains the stipulation that the matters stated therein are a "just and true exposition of all facts and circumstances in regard to the condition, situation and value of the property to be insured so far as the same are known to the applicant and material to the risk," the warranty is qualified, and it becomes the duty of the company to show the materiality of any variances from the facts stated, as they would be in case of representation. The effect and extent of the warranty must in all cases be governed by the manner in which the facts are stated in the contract. *Ætna Insurance Company v. Grube*, 82.

JUDGE OF PROBATE.

See "ACKNOWLEDGMENT," 3, 4, 5, 6.

JUDGMENT.

1. A judgment in a former suit for costs only, on the ground that the complaint contained no cause of action, and in which the merits were not litigated, constitutes no bar to a second suit for the same cause of action. *Gerrish & Brewster v. Pratt & Bunker*, 53.

2. Nor can such judgment be urged in abatement of the second suit after pleading to the merits. The proper way to take advantage of it in the second action, is to move for a stay of proceedings until the first judgment is paid. *Ib.*

3. The Plaintiff sued by his initial letters, and not his full name. *Held* bad practice, that may vitiate a judgment as against a purchaser of land, upon which it would otherwise be a lien, but that the defect cannot be reached by demurrer. *Gardner v. McClure et al.*, 250.

4. Judgment creditors (previous to the statute of 1858) are not in equity regarded as *bona fide* purchasers, and entitled to the consideration which equity gives them, when they become such without notice, for a valuable consideration actually paid; but they are looked upon simply as proceeding *in invitum* to enforce their legal demands, and are not entitled to the same favor as a purchaser, whose right may be enforced through the conscience of the other party. *Banning et als. v. Edes*, 402.

5. A Justice of the Peace has nothing to do with actions or defences of a purely equitable nature. If a party is sued before a Justice, and has a good defence to the action in equity, he may appeal to the District Court, and interpose his equities by way of answer, as if the action were originally commenced there. The refusal of that Court to allow time to interpose his equities does not confer upon him the right to make them the subject of another action. *Fowler et als. v. Atkinson*, 503.

6. Upon an appeal from a judgment, the Court may review an order refusing a new trial, made upon motion and case settled. *Mower et als. v. Hanford et als.*, 535.

7. Judgments in this Court may be set off upon motion,—and where one of the judgments is upon appeal, and the appeal undetermined, the motion may remain undecided until the final determination of the appeal, in order that the judgments may be set off in the event of affirmance. *Irvine et als. v. Myers & Co.*, 562.

8. Where there are judgments against, and in favor of each party to an action, rendered upon different trials thereof, the assignee of one of the judgments cannot escape having had notice of the judgment against his assignor at the time he took the assignment, the judgment being in the same action, upon a retrial

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upon the same record. And having such notice, he takes the judgment assigned, subject to the equitable right of the debtors therein, to have their judgment set off against it. *Ib.*

9. The judgment sought to be satisfied by set off, being in the Supreme Court, the motion for set off should be made in that Court, as it can act directly upon the record by its order. *Ib.*

10. Where an appeal is taken, the paper books should in all cases show whether the appeal is from an order or judgment. *Fowler et als. v. Atkinson*, 578.

11. It is only by appeal from the judgment that an abuse of discretion may be reviewed, and not by writ of error, as stated in *Fowler v. Atkinson*, 5 *Minn.*, 505. *Ib.*

12. The District Court has not power to compel a party to enter a judgment in an action, or to do any other affirmative act in the progress of a cause, which relates merely to the conduct of the same. Where the duty is clear and the other party is interested in its performance, the Court may always command it to be done under the penalty of being turned out of Court, if it is the Plaintiff, and of allowing the Plaintiff to proceed to judgment, if it is the Defendant who disobeys. If a Defendant obtains a verdict or other decision in a cause which requires to be perfected in judgment before an appeal or writ of error can be taken, and refuses to pursue it farther, the Plaintiff, if he desires a review, may obtain an order that the Defendant perfect it, or that it be vacated and his defence stricken out, or the Court may impose any similar appropriate and effective penalty to compel obedience. *The Syllabus in Duel vs. Hawks*, 2 *Minn. R.* 50, *corrected.*—*Sherrerd v. Frazer et als.*, 572.

JUSTICE OF THE PEACE.

1. *Sec.* 33 *of Chap.* 63 *of the Compiled Statutes, on pages* 592-93, is penal in its nature. Where a Justice of the Peace is sued under that section for not setting up a fee bill in his office, and acquitted, no appeal lies against him. *Kennedy v. Raught*, 235.

2. The section is limited in its operation to officers in, and to come into office, within six months after its passage. *Ib.*

JURISDICTION.

1. Under the State Constitution, the District Court is a court of general jurisdiction, and has original jurisdiction in civil actions, although the amount in controversy may be less than one hundred dollars. *Agin v. Heyward*, 110.

2. The District Court has original jurisdiction in every case where the Constitution itself does not clearly confer it on some other court. This jurisdiction extends to all causes which the Legislature may, in its discretion, authorize other courts to take cognizance of, because the discretion may never be exercised, or not to the extent authorized, and it is necessary, in the meantime, for some Court to have the jurisdiction. The authority possessed by the Legislature, to confer on other courts a portion of the jurisdiction vested by the Constitution in the District Court, does not imply the right to deprive the latter of such jurisdiction, but simply to authorize other courts to exercise it, concurrently with the District Court, in such cases. *Ib.*

3. The District Court has jurisdiction to try all actions against a county. *Bingham vs. the Board of Supervisors of Winona County*, 136.

4. Since the organization of the State government, the District Courts are Courts of general jurisdiction, and may entertain all cases, jurisdiction of which is not conferred upon some other Court by the Constitution, or some statute. The case of *Castner & Hinckley vs. Chandler & Green*, 2 *M. R.* 86, was decided under the Territorial Government, and is not authority since the Constitution. (See *Agin v Hayward, ante, p.* 110.) *The Southern Minnesota Railroad Company v Stoddard*, 150.

5. Where an officer is sued in trespass for taking property under process, the process alone, if regular and valid on its face, is sufficient to protect him, even if

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the officer who issued it had not jurisdiction. But the rule is different when the officer himself, or a party claiming under him, brings suit to recover the property, or its value, against a stranger intermeddling with the property. In such case he must show not only process regular upon its face, but that the Court or officer had jurisdiction to issue the same. *Clark v. Norton et al.*, 412.

6. In pleading the process of a Court of inferior and limited jurisdiction, it is necessary to allege every fact requisite to show that such Court had acquired jurisdiction of the subject matter, the parties and the process, and nothing is presumed in their favor so far as it respects jurisdiction; and the party seeking to avail himself of their process, must show that they had jurisdiction affirmatively. *Ib.*

7. Under the State Constitution the District Court has original jurisdiction in all cases, whatever the amount involved, except over "estates of deceased persons, and persons under guardianship." *Fowler et als. v. Atkinson*, 503.

JURY.

1. A jury were sent out with permission to seal up their verdict when agreed upon, and separated. Ten of the jurors had agreed for the Defendant, and two entertained different views. In order to be liberated they drew up a verdict for the Defendant, and the two who did not agree to it voted for it under protest. They informed the officer that they had agreed, and he allowed them to separate. When the jury came into Court the two jurors who had voted for the verdict under protest, avowed the fact, and upon being again asked if it was their verdict, one assented to it, and the other refused so to do. They were sent out again and finally agreed upon a verdict for the Defendant. *Held*, that the fact of one juror having entirely changed his views while out of the jury room and separated from his fellows, was strong ground for suspicion of abuse, and that improper influences were exerted upon him. Also, that the juror has not the right to make up his verdict apart from and unaided by the light of consultation and argument with his fellows; that a jury is composed of twelve men and does not admit of separate and individual action and decision. *Ætna Insurance Company v. Grube*, 82.

2. Where a question of fact has been submitted to a Court or Jury, and evidence touching the same has been received on the part of both Plaintiff and Defendant, the finding will not be disturbed on the ground that it is contrary to the weight of evidence, nor unless it is manifestly contrary to the evidence. *Dixon v. Merritt et als.*, 160.

3. Where a jury retire in the evening, and the Court adjourns before they agree, the Judge cannot meet the jury in the absence of the parties and receive their verdict out of Court, discharge the jury and render the verdict himself on the opening of the Court, the following day. Such a proceeding is irregular. *Kennedy v. Raught*, 235.

4. In cases of voluntary assignments, an unlawful intent appearing on the face of the instrument, vitiates the conveyance. Where the language or provisions of the instrument betray the intent, the proof is deemed conclusive and there is nothing to submit to a jury. Where such is not the case, and the jury find the intent from extrinsic evidence, the result is equally fatal to the validity of the conveyance. The question of fraudulent intent is a mixed question of law and fact: that is, the question of the existence of a certain intent is a question of fact for the jury, (when not disclosed by the papers,) and for the Court to declare whether such intent be fraudulent or otherwise. The fact that the assignee had no knowledge of the fraudulent intent cannot cure the fraud of the assignor. The assignee of an insolvent, accepting the trust, is not a purchaser for a valuable consideration. So, if the jury find that the intent of the assignors at the time of the assignment, was to prevent a forced sale of their property, in order that the business might be continued and the goods sold at retail, the Court should have charged that the deed was void. *Gere v. Murray*, 305.

5. If a juror is challenged for actual bias and the parties by consent submit the question of bias to the Court, the finding of the Court thereon is conclusive. *Morrison et als. v. Lovejoy et al.*, 319.

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6. If the truth of a challenge be admitted by the other party, there is nothing left to be tried; and it is not error for the Court to refuse to permit the juror thereafter to be examined by the party challenging, nor to refuse him permission to withdraw his challenge. *Ib.*

7. A Judge in charging a jury is less liable to misconstruction when he states his points and their qualifications together, yet his charge must be taken as a whole, and if it contains a correct statement of the law, it will not be held erroneous for want of methodical arrangement. *Guerin v. Hunt et al.*, 375.

8. The taking the note or security of a person, other than the debtor, is not *prima facie* evidence that the same was taken in payment of a precedent debt. There must be evidence of an express agreement to take such note in payment, in order to give it that effect, and the burden of proof is upon the debtor to show such agreement. But the rule seems to be different where a commercial instrument is given in payment of a contemporaneous sale, and the vendee is not liable on the instrument. In such case the presumption of law is that the vendee is not liable on the original indebtedness; but the acceptance by a vendor of goods, at the time of the sale, of a draft drawn by the vendee upon a stranger, and accepted by him, is not *prima facie* evidence that the same was taken as absolute payment of the purchase money. The question is one of fact for the jury to determine. *Devlin et als. v. Chamblin et als*, 468.

LIEN LAWS.

1. The deposit of title deeds of land, with a creditor, as security for a debt, even if accompanied with a writing stating the object of the deposit, will create no estate in the land in favor of the creditor, but merely gives him a lien on the deeds The English doctrine upon the subject repudiated, as having been founded in acknowledged error. *Gardner v. McClure et al.*, 250.

2. A vendor taking security upon the land sold, does not, by that act, waive his equitable lien, provided he has expressly agreed with the purchaser that it shall be retained. Where such agreement has been made, the lien will attach to the property in the hands of the vendee, and all persons claiming under him with notice of the agreement. *Daughaday v. Paine et al*, 443.

See "MORTGAGE."

MARRIED WOMEN.

1. H executed, acknowledged and delivered a mortgage upon certain real estate belonging to the wife. His wife signed the mortgage, and the notary certified that she acknowledged the same on a private examination, separate and apart from her husband. The facts proved that she had never, in any manner acknowledged the same, and that she never received any part of the consideration named in the mortgage. *Held*, That the acknowledgment on the part of the wife, required by the statute, is an essential part of the execution of the instrument, without which no interest in the estate passes, and without such acknowledgment the mortgage is invalid so far as the separate estate of the wife is concerned. *Dodge v. Hollinshead*, 25. *See also, Annan v. Folsom*, 500.

MISTAKE.

See "SHERIFF."

MORTGAGE.

1. H executed, acknowledged and delivered a mortgage upon certain real estate belonging to the wife. His wife signed the mortgage, and the notary certified that she acknowledged the same on a private examination, separate and apart from her husband. The facts proved that she had never in any manner acknowledged the same, and that she never received any part of the consideration named in the mortgage. *Held*, That the acknowledgment on the part of the wife, required by statute, is an essential part of the execution of the instrument, without which no interest in the estate passes, and without such acknowledgment the mortgage is invalid so far as the separate estate of the wife is concerned. *Dodge v. Hollinshead*, 25. *See also, Annan v. Folsom*, 500.

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2. A complaint setting forth that the Plaintiff had executed, acknowledged and delivered to the obligee a bond, conditioned for the conveyance of certain real estate therein specified, upon being paid a certain amount of money; that said bond had been duly recorded; that default had been made by the obligee in making payment according to the terms of the contract, alleging that the obligor had performed on his part all that was required by the terms of the contract, and tendering the deed in Court and asking that the Defendant be required to pay the balance due and accept the deed, at or before a time certain to be fixed by the Court, or in default thereof, that the bond be delivered up to be cancelled, and the Defendant thereafter be barred of all right, title and interest in and to the premises, states a good cause of action. *Dahl et als. v. Pross*, 89.

3. Courts of Equity have ordinarily construed such an instrument as an agreement to convey lands. It is not a mortgage, and differs widely from that instrument In case of a bond for a deed, no sale of the premises is provided for in the instrument, or contemplated by the parties in case of default by either. If the obligor refuses to convey upon being paid according to the conditions specified, the obligee has his remedy upon the bond, or, perhaps, may have the aid of the Court for a specific performance, or a decree for the conveyance. If the obligee fail, the obligor has his remedy upon such evidences of debt as he may have received, or to have the bond cancelled. Upon such default the obligee can claim no rights, legal or equitable, and the bond is *functus officio*. *Ib.*

4. Such a bond, however, properly witnessed and acknowledged, and recorded, creates a lien upon the land, and is notice to purchasers of any equities the obligee may be able to set up against the obligor. And as a Court of equity will sometimes interfere to relieve against a default, the existence of the bond casts a cloud or shadow upon the obligor's title, which he is entitled to have removed. *Ib.*

5. In a mortgage foreclosure by advertisement, the amount claimed to be due at the date of the notice, should be the sum legally due, but a trifling excess in such amount, arising from mistake, and not of sufficient magnitude to deter bidders, will not vitiate the sale. Any amount within the terms of the security, may be claimed in the notice. The case of *Spencer v. Annan*, 4 *M. R.*, 542, approved. *Ramsey v. Merriam et al*, 168.

6. It is not essential to the validity of a notice of sale, in a foreclosure by advertisement, that it should be dated. When it is dated, the time so fixed will be taken as the true date. When nothing appears upon its face evidencing the date, the time of its first appearance, by publication, will be the date. *Ib.*

7. A mortgagee may become the purchaser, at a mortgage sale of land, under a power that runs to himself, provided the sale is made in good faith, by the Sheriff, in accordance with the provisions of the statute. *Ib.*

8. The lien of a mortgage lasts as long as the debt which it is given to secure; and nothing but an actual payment of such debt, or an express release, will operate as a discharge of the mortgage. *Folsom et al, v. Lockwood*, 186.

9. If the mortgage contain a power of sale, and the mortgagee sell the land in pursuance of the power, and the sale is afterwards set aside at the instance of the mortgagor, by a court of competent jurisdiction, the lien of the mortgage is not thereby discharged. *Ib.*

10. In a foreclosure of mortgage by advertisement, the notice was first published August 3d, and published successively once in each week up to and including September 14th, the day of sale. *Held*, A sufficient publication under the statute. *Worley et al, v Naylor et als*, 192.

11. The mortgaged premises consisted of four hundred acres of land, lying in three different sections, and in two distinct townships. Three hundred and twenty acres lay contiguous and in one body, and eighty acres, separated from the former by intervening lands, and also in one body. The three hundred and twenty acre tract was sold in one parcel, and the eighty acre tract in another. *Held*, That there was no error in selling in this manner, and that the mortgagee was not obliged to offer the lands in government subdivisions, nor in as small subdivisions or parcels as were described in the mortgage. *Ib.*

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12. A mortgagee sold a piece of land under a foreclosure by advertisement, by virtue of a power of sale contained in the mortgage, authorizing him to sell and pay himself whatever was due on the mortgage. In the notice of sale he claimed about twice as great a sum to be due as was actually due upon any calculation that could be made upon the terms of the note or mortgage. He became himself the purchaser, bidding the full amount alleged to be due. He refused a subsequent mortgagee the privilege of redeeming by paying what was in fact due, but insisted upon the whole sum being paid, and interest. The second mortgagee paid the whole amount under protest, and brought suit to recover back the excess. *Held*, The action would lie. *Held also*, That a foreclosure under the statute by advertisement, which is regular within the terms of the power, is binding upon subsequent incumbrancers, notwithstanding they have no notice except such as is conveyed to them through that published in the newspaper. *Bennett et als, v. Healey*, 240.

13. The cases of *Bidwell v. Whitney*, 4 *M. R.*, 76 and *Banker v. Brent*, *id.*, 526, commented upon and explained. *Ib.*

14. A mortgage, executed in the presence of only one witness is ineffectual to pass any interest or estate in the lands described, and is not entitled to record. The record of such mortgage is no notice to any one. *Thompson et als, v. Morgan.* 292.

15. The recital of such a defective mortgage in a deed of the same lands by the mortgagor, merely describing the mortgage and declaring the deed to be subject to it, does not estop the grantee in the conveyance, or those holding under him, from questioning the validity of the mortgage. *Ib.*

16. The certificate of acknowledgment to a deed or mortgage need not be under seal, unless the statute authorizing the officer to take it expressly requires it. If the certificate styles the officer taking it as an officer authorized by law to perform the act, it will be *prima facie* evidence of his official character. The Statutes of this State in force in 1854, did not require a seal to such certificates. *Ib.*

17. The act of the Legislature of July 26, 1858. (*Comp. Stats.*, 403 4.) does not affect any rights that were vested prior to its passage. The Legislature may perhaps have power to cure irregularities in conveyances between the parties to them, and all persons who take subsequent to the cure being wrought, but it cannot disturb vested rights. *Ib.*

18. The date of a deed or mortgage is only presumptive evidence of the time of delivery, and this presumption may always be rebutted by proof. *Banning v. Edes*, 402.

19. The owner in fee of land, in conveying the same by deed, may limit or restrict the estate granted in any manner he chooses, (not repugnant to the grant intended) and the grantee will take only the estate as limited. *Daughaday v. Paine et al*, 443.

20. Whenever the instruments forming the purchaser's chain of title disclose an incumbrance, he is equally bound by such notice, as by the record of the instrument itself, creating or evidencing the incumbrance, or actual notice of the same, as in case of vendor's lien without mortgage. *Ib.*

21. A purchaser who relies upon an abstract of title, which does not exhibit the contents of the conveyances forming the chain of title, will be deemed guilty of *crassa negligentia*, and the fact that such is the usual custom of the country in the transfer of real estate, raises no equity in his favor. *Ib.*

22. The act of March 8, 1860, (*Sess. Laws of* 1860, *p.* 216,) was designed to compel parties whose demands were secured in the manner stated in the act, to proceed first to exhaust their securities, before bringing suit upon the original claim. The assertion of this power by the Legislature is not unconstitutional. But the second section of the act, so far as it permits an election with the creditor whether he will sue or not, is in conflict with the first section, and also with the spirit of the act; and so far as it provides for the release and discharge of securities as a consequence of bringing suit, it is in conflict with the Constitution of the United States, and of this State. *Swift v. Fletcher*, 550.

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23. An endorser of a secured note may, under the above act, compel the holder to exhaust the security before resorting to him. *Ib.*

MOTION.

1. Where the Defendant pleads in time, the Court has no discretion on the question of opening up a judgment entered against him by default. A motion for this purpose is not an appeal to the favor of the Court, but an application for the enforcement of a right; and a denial of it may be reviewed in this Court. Where the answer is not in time, a motion for leave to plead is addressed to the discretion and favor of the Court, and not appealable, unless such discretion is abused. *Swift v. Fletcher*, 550.

2. When a motion is once denied for any cause, technical or on the merits, the defeated party must obtain leave from the Court before he can renew it upon the same state of facts. *Irvine v. Meyers & Co.*, 558.

3. Where the return to an appeal is not filed in this Court until too late to permit the giving ten days' notice of argument, as required by Rule XV, of this Court, the rule does not apply, and the Respondent may move a dismissal at any time during the term, upon eight days' notice of motion. *The Commonwealth Insurance Company v. Pierro*, 569.

4. Where the original papers are used upon a motion relating to the record in a cause, the Court may take judicial notice of the Clerk's signature to the file marks, although they may be from another District. But the records should never be allowed to leave the clerk's office for any purpose without an order from the Court. Exemplifications of the records, and also sworn copies properly examined and compared, and the affidavits of parties familiar with the facts upon which the questions arise, are always competent evidence in such motions. *Sherrerd v. Frazer et als.*, 572.

See "AMENDMENT."

NEW TRIAL.

1. In cases where a new trial is awarded for error committed by the Judge, the costs of the irregular trial should abide the event of the suit, and be recoverable by the party who ultimately succeeds. *Walker v Barron*, 508.

15. A new trial will not be granted upon the ground of newly discovered evidence upon an affidavit stating that affiant is informed and believes that certain parties will testify in a certain manner, if a new trial is granted. The affidavits of the witnesses should be produced when they can be obtained, and there should appear a sufficient excuse for not producing the testimony on the former trial. *Keough v. McNitt*, 513.

See "NEWLY DISCOVERED EVIDENCE," 1.

NEWLY DISCOVERED EVIDENCE.

1. The testimony had closed, and the Defendant was arguing the case to the jury. At this point the Defendant informed the Court that he had just discovered a material fact, before unknown to him, and asked leave to prove it, which was refused. The Defendant, after concluding his remarks to the jury, presented an affidavit to the Court, setting forth the newly discovered fact, and again asked leave to prove it, which was again refused. *Held*, That the Defendant was right in offering to prove the newly discovered fact immediately on ascertaining its existence; that had he waited until after the verdict, that fact alone would have been a sufficient answer to the application. *Held further*, That to authorize a Court to open a case for newly discovered evidence, the evidence should be of that character that the party offering it could not, with due exercise of prudence, diligence and foresight, have discovered it before or at the trial, and that it should not be a mere explanation of the witness' evidence on the trial. Where a witness swears that the consideration of a deed was money paid at the time of the purchase, and after the trial states that it was for a precedent debt, an affidavit alleging the latter statement of the witness will be insufficient to open the case on the ground of newly discovered evidence. Something should appear to satisfy the Court that the fact exists, and can be proven; the mere statement of a witness

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who had sworn once the other way is too unreliable to be acted upon. *Baze v. Arper*, 220.

2. A new trial will not be granted upon the ground of newly discovered evidence upon an affidavit stating that affiant is informed and believes that certain parties will testify in a certain manner, if a new trial is granted. The affidavits of the witnesses should be produced when they can be obtained, and there should appear a sufficient excuse for not producing the testimony on the former trial. *Keough v. McNitt*, 513.

NOTARY PUBLIC.

See "DEED."

OFFICIAL SEALS.

See "ACKNOWLEDGMENT," 4, 7.

OCCUPANTS.

See "TOWN SITE ACT."

PAPER BOOKS.

1. Where an appeal is taken the paper books should, in all cases, show whether the appeal is from an order or judgment. *Fowler et als, v. Atkinson*, 578.

PAROL EVIDENCE.

See "EVIDENCE."

PARTIES.

1. There should always be a competent party representing every interest that is litigated in Court, in order that the process of the Court may have some one to operate upon. The "estate" of a decedent has no legal personality that can have a status in Court. It must be represented by some person or persons capable of suing or being sued. *Estate of Columbus v. Monti*, 568.

PARTNERSHIP.

1. The real estate of a partnership is in equity treated as mere personalty, and governed by the rules and doctrines applicable to that species of property. *Arnold et als. v. Wainwright*, 358.

2. Whether land is to be deemed part of a partnership stock depends upon the agreement of the partners, which agreement may be either expressed or implied. *Ib.*

3. Lands may be converted into partnership stock by parol agreement of the partners, or by such facts and circumstances attending its acquisition or use, as will raise an implication that the partners so intended. The legal estate will be controlled by the terms of the conveyance, but equity will subject the lands to the same liabilities imposed upon other partnership estate, and restrict the partners to the same extent in their disposition of them as obtains in regard to the personalty. *Ib.*

4. Where a partnership makes an assignment for the benefit of creditors of the partnership effects, and such assignment is assailed for fraud, it is incompetent to prove that one of the partners had previously disposed of portions of his individual property on a secret trust in his own favor. *Guerin v. Hunt et al.*, 375.

PAYMENT.

1. The taking of the note or security of a person, other than the debtor, is not *prima facie* evidence that the same was taken in payment of a precedent debt. There must be evidence of an express agreement to take such note in payment, in order to give it that effect, and the burden of proof is upon the debtor to show such agreement. But the rule seems to be different where a commercial instrument is given in payment of a contemporaneous sale, and the vendee is not liable on the instrument. In such case the presumption of law is that the vendee is not liable on the original indebtedness; but the acceptance by the vendor

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of goods, at the time of the sale, of a draft drawn by the vendee upon a stranger, and accepted by him, is not *prima facie* evidence that the same was taken as absolute payment of the purchase money. The question is one of fact for the jury to determine. *Devlin et als. v. Chamblin et als*, 468.

2. Parties may, by express agreement, make the giving of a note or bill of exchange for the amount of an existing debt, operate as a payment of such debt; particularly where a new and additional consideration passes from the debtor to the creditor. *Keough v. McNitt*, 513.

PLEADINGS AND PRACTICE.

See "ACTION," "AMENDMENT," "ANSWER," "ASSUMPSIT," "APPEAL," "COMPLAINT," "CONSTRUCTION OF STATUTES," "COSTS," "COUNTER CLAIM," "CUSTOM," "DAMAGES," "DEED," "DISTRICT COURT," "DIVORCE," "EJECTMENT," "ESTOPPEL," "EVIDENCE," "INDICTMENT," "JURISDICTION," "JURY," "MORTGAGE," "PROCESS," "RECORD," "REPLEVIN," "STIPULATION," "SUPREME COURT, "VERDICT," "WITNESS."

POLICY OF INSURANCE.

See "INSURANCE."

PUBLICATION.

See "MORTGAGE," 10.

PRINCIPAL AND SURETY.

1. Action for rent of land Defendant pleaded as a counter-claim a demand against the Plaintiff for contribution as co surety with the Defendant on an appeal bond, in a matter entirely distinct from the Plaintiff's cause of action, the Defendant having paid the whole amount Whether such a demand is the proper subject of set off or counter claim—*doubted*. *Schmidt v. Coulter*, 492.

2. In an action against a co surety, upon an appeal bond, the principal not being made a party, whether the surety can claim contribution against his co-surety, without showing the insolvency of the principal—*doubted*. *Ib.*

3. Where one of two or more co sureties obtains in any manner a security for the debt, he holds it for the benefit of all the other sureties, and must do no act, nor voluntarily omit to do any act, by which such security is depreciated or lost, but must faithfully appropriate it to the payment of the debt, or he will be chargeable with the amount of the security to his co sureties, in an adjustment of their proportions of the debt. *Ib.*

PRINCIPAL AND AGENT.

See "AGENCY."

PROCESS.

1. Where an officer is sued in trespass for taking property under process, the process alone, if regular and valid on its face, is sufficient to protect him, even if the officer who issued it had not jurisdiction. But the rule is different when the officer himself, or a party claiming under him, brings suit to recover the property, or its value, against a stranger interm dilling with the property. In such case he must show not only process regular upon its face, but that the Court or officer had jurisdiction to issue the same. *Clark v. Norton et al.*, 412.

2. The right of an officer to bring an action for goods levied upon by him, depends upon his special property, and liability over; if the process be void, he acquires no title, and cannot be liable over to the Plaintiff at whose suit the process issued, and consequently cannot and ought not to be permitted to maintain an action for the recovery of the property, or its value. *Ib.*

3. In pleading the process of a Court of inferior and limited jurisdiction, it is necessary to allege every fact requisite to show that such Court had acquired jurisdiction of the subject matter, the parties and the process, and nothing is presumed in their favor so far as it respects jurisdiction; and the party seeking to avail himself of their process, must show that they had jurisdiction affirmatively. *Ib.*

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PROMISSORY NOTE.

1. The taking the note or security of a person, other than the debtor, is not *prima facie* evidence that the same was taken in payment of a precedent debt. There must be evidence of an express agreement to take such note in payment, in order to give it that effect, and the burden of proof is upon the debtor to show such agreement. But the rule seems to be different where a commercial instrument is given in payment of a contemporaneous sale, and the vendee is not liable on the instrument. In such case the presumption of law is that the vendee is not liable on the original indebtedness; but the acceptance by a vendor of goods, at the time of the sale, of a draft drawn by the vendee upon a stranger, and accepted by him, is not *prima facie* evidence that the same was taken as absolute payment of the purchase money. The question is one of fact for the jury to determine. *Devlin et als, v. Chamblin et als.* 468.

2. Parties may, by express agreement, make the giving of a note or bill of exchange for the amount of an existing debt, operate as a payment of such debt; particularly where a new and additional consideration passes from the debtor to the creditor. *Keough v. McNitt*, 513.

3. It may always be shown in defence to an action on a note in the hands of original parties, that it never was perfected by delivery, or that there was no consideration moving between the parties to support it. *Ruggles et als. v. Swanwick et al.*, 526.

4. An endorser of a secured note may, under the above act, compel the holder to exhaust the security before resorting to him. *Swift v. Fletcher*, 550.

6. The mere addition of the words "Trustees of School District No. 5" to the signatures to a promissory note, will not relieve the makers from personal liability thereon. It must appear in or from the instrument itself, that they executed the same in their capacity as trustees. *See Sanborn v. Neal et al*, 4 *Minn.* 126. *Fowler et als. v. Atkinson*, 578.

PURCHASER.

See "BONA FIDE PURCHASER," "ABSTRACT OF TITLE."

RAILROAD CHARTER.

1. All railroad charters that do not directly express the contrary, must be taken to allow the exercise of such a discretion in the location of the route as is incident to an ordinary practical survey made with reference to the nature of the country to be passed over, and the obstacles to be encountered or avoided, not deviating substantially from the course and direction indicated by the charter. *Southern Minnesota Railroad Company v. Stoddard*, 150.

RAPE.

See "INDICTMENT."

RECORD.

1. The record of a conveyance acknowledged before an officer not authorized to take acknowledgments, is no notice to subsequent purchasers, but the deed was good against an attaching creditor until the passage of the act of 1858. *Chap* 52, *sec* 1, *General Laws* 1858. *Baze v. Arper*. 220.

2. A mortgage executed in the presence of only one witness is ineffectual to pass any interest or estate in the lands described, and is not entitled to record. The record of such a mortgage is no notice to any one. *Thompson et als. v. Morgan*, 292

3. If the case is not properly a part of the record in the Supreme Court, a motion should be made to strike the same from the record; not to dismiss the appeal. If the record improperly presents matters prejudicial to either party, it may be corrected on cause shown. *Mower et als, v. Hunford et als*, 535.

7. Where the original papers are used upon a motion relating to the record in a cause, the Court may take judicial notice of the Clerk's signature to the

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file marks, although they may be from another District. But the records should never be allowed to leave the clerk's office for any purpose, without an order from the Court. Exemplifications of the records and also sworn copies, properly examined and compared, and the affidavits of parties familiar with the facts upon which the questions arise, are always competent evidence in such motions. *Sherrerd v. Frazer et als*, 572.

REFEREES.

1. It is only in actions tried by jury that it is necessary for the Appellant to make a case. In actions tried by the Court or a Referee, this Court will review the question whether the facts found sustain the conclusions of law, upon the report of the referee or finding of the Court, without a case embodying them. The statute provides for the preparation of a case within five days after trial before the Court or a referee and the trial in such cases must be continued or considered pending until the filing of the decision. *Irvine v. Meyers & Co.*, 558.

REPLEVIN.

1. The right of an officer to bring an action for goods levied upon by him, depends upon his special property, and liability over; if the process be void, he acquires no title, and cannot be liable over to the Plaintiff at whose suit the process issued, and consequently cannot and ought not to be permitted to maintain an action for the recovery of the property, or its value. *Clark v. Norton et al*, 412.

2. Certain goods were attached by a constable, in an action in favor of *Kercher v. Kniskern*, for $30 82 and costs. The property was replevied by one Norton, and the replevin bond was conditioned that Norton should appear on the return day, and prosecute his suit to judgment, and return the property if a return thereof be adjudged by the Court, and pay all costs and damages that might be adjudged against him. In a suit upon the bond, the Plaintiff assigns as a breach, that the said Norton did not prosecute his suit, &c., but that the same was dismissed, and judgment rendered against him for the costs of the action. Upon these facts the Plaintiff avers that an action hath accrued to him to recover the amount of the judgment in the action in which the attachment issued, and damages. *Held*, That in the replevin suit, the Defendants should have asked for a judgment *de retorno*, and have had their damages assessed; and a judgment for the return and damages would have fixed the liability of the sureties on the bond. As it was there was no breach of the bond to warrant the judgment demanded. *Ib.*

SHERIFF.

1. A Sheriff having attached certain real property of the judgment debtor, proceeds to sell on execution, but advertises and sells under an erroneous description, intending, however, to sell the property attached. The judgment creditor purchases at the sale, in the belief that he is purchasing the property attached, and wholly ignorant of the error in the description. It afterwards appears that the judgment debtor has no manner of title or claim to the property as described in the advertisement and certificate of sale. *Held*, That a Court of Equity will relieve from the mistake. *Lay et als, v. Shaubhut et al*, 273.

STATUTE OF FRAUDS.

See "TRUST AND TRUSTEE."

STIPULATION.

1. An order setting aside a stipulation settling the issues to be tried, and allowing an amendment to an answer, is appealable. *Bingham v. Board of Supervisors of Winona County*, 136.

2. Such a stipulation has, by virtue of the statute, the force of a contract, and cannot be disturbed except upon such grounds as would be sufficient to set aside any other contract between the parties. Such settlement of the issues by stipulation should have as much effect as their determination by the verdict of a jury,

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and the same, or as strong reasons are required to set aside such stipulation as would be required to set aside a verdict. *Ib.*

8. The mere fact, that a party by such stipulation has waived defences, which he might otherwise urge, is not sufficient ground for setting aside such stipulation. It must appear that the stipulation was obtained by fraud or collusion, accident, or surprise, or some ground of this nature, to justify the setting aside of the same. *Ib.*

SUPREME COURT.

1. In an action between adverse claimants, brought under the provisions of the act prescribing rules and regulations for the execution of the trust arising under the act of Congress relating to the entry of town sites, the Supreme Court is required, upon appeal, to review and pass upon questions of fact as well as of law, and must examine the evidence, and determine for themselves what facts are established. *Castner v. Gunther*, 119.

2. Upon an appeal from a judgment, the Court may review an order refusing a new trial, made upon motion and case settled *Mower et als. v. Hanford et als.*, 535.

3. If the case is not properly a part of the record in the Supreme Court, a motion should be made to strike the same from the record; not to dismiss the appeal. If the record improperly presents matters prejudicial to either party, it may be corrected on cause shown. *Ib.*

4. The granting or refusal of an application for leave to propose a case after the time prescribed by statute has expired, is always within the discretion of the Court, and decisions thereon are not appealable. Nothing but an abuse of this discretion will justify the interference of this Court. *Irvine v. Meyers & Co.*, 558.

5. It is only in actions tried by jury that it is necessary for the Appellant to make a case. In actions tried by the Court or a Referee, this Court will review the question whether the facts found sustain the conclusions of law, upon the report of the Referee or finding of the Court, without a case embodying them. The statute provides for the preparation of a case within five days after trial before the Court or a referee and the trial in such cases must be continued or considered pending until the filing of the decision. *Ib.*

6. Judgments in this Court may be set off upon motion,—and where one of the judgments is upon appeal, and the appeal undetermined, the motion may remain undecided until the final determination of the appeal, in order that the judgments may be set off in the event of affirmance. *Irvine et als. v. Myers & Co.*, 562.

7. The judgment sought to be satisfied by set off, being in the Supreme Court, the motion for set off should be made in that Court, as it can act directly upon the record by its order. *Ib.*

10. Where the return to an appeal is not filed in this Court until too late to permit the giving ten days' notice of argument, as required by Rule XV. of this Court, the rule does not apply and the Respondent may move a dismissal at any time during the term, upon eight days' notice of motion. *The Commonwealth Insurance Company v. Pierro*, 569.

SUPERSEDEAS.

1. The issuance of a writ of error and putting in bail did not operate as a *supersedeas*, or even stay of execution which had been levied before the issuance of the writ, but the sheriff could proceed to a sale as if no writ of error had been sued out. Our statute (*Stats of Minn., p.* 623 4. *sec.* 25.) provides a stay of execution in case of writ of error and bond, but the stay does not supersede the execution so as to annul what has been done under it; it simply checks the sheriff from proceeding further. The Sheriff may retain the property levied upon until the decision of the Court above, or the order of the Court. *The North Western Express Company v. Landes*, 564.

SURETY.

See "PRINCIPAL AND SURETY."

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TENDER.

1. The obligee in a bond for a deed is not entitled to a tender of a deed until payments are made in accordance with its conditions. *Dahl et als. v. Pross*, 89.

TOWN SITE ACT.

1 In an action between adverse claimants, brought under the provisions of the act prescribing rules and regulations for the execution of the trust arising under the Act of Congress relating to the entry of town sites, the Supreme Court is required, upon appeal, to review and pass upon questions of fact as well as of law, and must examine the evidence, and determine for themselves what facts are established. *Castner v. Gunther*, 119.

2. The Defendant in such an action, cannot deny the title of the Plaintiff, except upon the terms of setting up a valid title in himself. *Ib.*

3. Where the occupants of a town site have made proper application to have the lands entered for their use and benefit, and have shown, by proofs adjudged to be sufficient, that they have performed the conditions necessary to entitle them to have the land so entered, their right to the lands is perfected, and no person can thereafter, by mere settlement and improvement, acquire a right under the law to any portion of said town site, as against said occupants. *Ib.*

4. Where, upon an appeal from the decision of the Register and Receiver, and of the Commissioner of the General Land Office, the Secretary of the Interior decided that the application to enter a town site should have been allowed—and directed the local office to permit the entry to be made in accordance with such application and decision—the local or other land offices cannot, by requiring or permitting the lands to be entered upon a new application, or upon new or additional proofs, or by a person or officer other than the one who made the application upon which such decision was rendered, impair the rights of the occupants to the full benefit of the decision made in their favor. *Ib.*

5. If, after the Judge of the proper county has made an application to enter a town site, his term of office expire before a final decision allowing such entry, and his successor is permitted to make the entry in accordance with such application and decision, the lands will be held by the latter upon the same trust as though they had been entered by the officer who made the original application. *Ib.*

6. The decision of the Secretary of the Interior, of December 18, 1857, in favor of the entry of the town site of Mankato, was rendered upon the application of Judge Chatfield, and upon proofs thereon submitted by the occupants, on the 21st of March, 1856, and the entry thereof on the 6th of March, 1858, though made by Judge Flandrau, was for the purpose of carrying into effect the decision in favor of Judge Chatfield's application; and was allowed and approved upon the proofs previously, on the 21st of March, 1856, submitted, and not upon proofs offered at the instance of the Register and Receiver, at the time of such entry. *Ib.*

TRESPASS.

1. Where an officer is sued in trespass for taking property under process, the process alone, if regular and valid on its face, is sufficient to protect him, even if the officer who issued it had not jurisdiction But the rule is different when the officer himself, or a party claiming under him, brings suit to recover the property, or its value, against a stranger intermeddling with the property In such case he must show not only process regular upon its face, but that the Court or officer had jurisdiction to issue the same. *Clark v. Norton et al.*, 412.

2. Assumpsit for use and occupation cannot be supported where the possession is adverse, and the relation of landlord and tenant has never subsisted between the parties; but the Plaintiff must declare in ejectment or trespass. Such a demand could not have been the subject of a set-off to an action upon a note prior to the adoption of the code in 1851. *Folsom v. Carli*, 420.

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TRIAL BY COURT.

1. Where a question of fact has been submitted to a Court or Jury, and evidence touching the same has been received on the part of both Plaintiff and Defendant, the finding will not be disturbed on the ground that it is contrary to the weight of evidence, nor unless it is manifestly contrary to the evidence. *Dixon v. Merrill et als.*, 160.

TRUST AND TRUSTEE.

1. The Statute, pages 382 3-4, although designed to do away with some trusts that would otherwise result, was not intended to cut off trusts in favor of a partnership, where the lands are conveyed to the individual members of the firm as tenants in common. Nor does the recognition of such a trust conflict in any manner with the statute of frauds. Such a trust, while it will be enforced against a purchaser or mortgagee, from one of the co partners or his representatives, who has notice, actual or constructive, that the land is partnership property, cannot be enforced against a *bona fide* purchaser or mortgagee without such notice. *Arnold et als. v. Wainwright*, 358.

2. In this action, (brought to set aside certain deeds as fraudulent.) the complaint prayed that the grantee in the deeds be adjudged a trustee of the value of the lands conveyed to him, as the same were at the date of the deeds, and to pay the amount of the same to such person as the Court might appoint. After verdict, and before judgment, and pending a stay of Plaintiffs' proceedings, they obtained an order for Defendants to show cause why certain logs alleged to have been cut by the grantee on these lands, the previous winter, should not be delivered to the Sheriff of the County of Washington, to be by him sold and converted in money, and the proceeds brought into Court, &c. Upon the hearing this order was made absolute. *Held*, that the grantee being treated in the complaint as trustee of the property, the Court could not, of its own motion, or upon the mere request of the Plaintiffs, have taken the property from the trustee and placed it in the hands of the Sheriff. If he had been appointed as trustee under the prayer in the complaint, he would have been entitled to receive the rents, issues and profits of the lands, or even to sell the same, holding the proceeds for the Plaintiffs' benefit. He would be subject however to the order of the Court, and might be removed or restrained for any abuse or improper exercise of the trust reposed in him, or when it is shown that the trust fund is likely to be misapplied or lost in his hands. *Mower et als. v. Hunford et als.*, 535.

USAGE.

See "CUSTOM."

VERDICT.

1. A jury were sent out with permission to seal up their verdict when agreed upon, and separated. Ten of the jurors had agreed for the Defendant, and two entertained different views. In order to be liberated they drew up a verdict for the Defendant, and the two who did not agree to it voted for it under protest. They informed the officer that they had agreed, and he allowed them to separate. When the jury came into Court the two jurors who had voted for the verdict under protest, avowed the fact, and upon being again asked if it was their verdict, one assented to it, and the other refused so to do. They were sent out again and finally agreed upon a verdict for the Defendant. *Held*, that the fact of one juror having entirely changed his views while out of the jury room and separated from his fellows, was strong ground for suspicion of abuse, and that improper influences were exerted upon him. Also, that the juror has not the right to make up his verdict apart from and unaided by the light of consultation and argument with his fellows; that a jury is composed of twelve men and does not admit of separate and individual action and decision. *Ætna Insurance Company v. Grube*, 82.

2. Where there were several issues of fact joined in the pleadings, and the jury having been sworn to "try the issues joined between the parties," found and returned a special verdict which passed upon but one issue, and a judgment was predicated upon such verdict only—*Held*, that the verdict was not sufficient to warrant the judgment. *Meighen et al. v. Strong*, 177.

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3. Where a jury retire in the evening, and the Court adjourns before they agree, the Judge cannot meet the jury in the absence of the parties and receive their verdict out of Court, discharge the jury and render the verdict himself on the opening of the Court, the following day. Such a proceeding is irregular. *Kennedy v. Raught*, 235.

WITNESS.

1. The record of a deed for the conveyance of lands in this State, executed in the presence of one witness only, cannot be admitted in evidence. *Meighen et al, v. Strong*, 177.

2. Where, as in this State, the statute prescribes the manner in which only a conveyance of real property by deed can be made, any attempt to convey without complying with the requisites of the statutes must be treated as a nullity; and the Legislature could not give it validity so as to affect persons who may have subsequently acquired title to the property, without divesting them of rights which they had legally acquired *Ib.*

3. A mortgage executed in the presence of only one witness is ineffectual to pass any interest or estate in the lands described and is not entitled to record. The record of such mortgage is no notice to any one. *Thompson et als. v. Morgan*, 292.

4. The recital of such a defective mortgage in a deed of the same lands by the mortgagor, merely describing the mortgage and declaring the deed to be subject to it, does not estop the grantee in the conveyance, or those holding under him, from questioning the validity of the mortgage. *Ib.*

5. The act of the Legislature of July 26, 1858. (*Comp. Stats.*, 403 4,) does not affect any rights that were vested prior to its passage. The Legislature may perhaps have power to cure irregularities in conveyances between the parties to them, and all persons who take subsequent to the cure being wrought, but it cannot disturb vested rights. *Ib.*

6. A new trial will not be granted upon the ground of newly discovered evidence upon an affidavit stating that affiant is informed and believes that certain parties will testify in a certain manner, if a new trial is granted. The affidavits of the witnesses should be produced when they can be obtained, and there should appear a sufficient excuse for not producing the testimony on the former trial. *Keough v. McNitt*, 513.

See "NEWLY DISCOVERED EVIDENCE."

WRIT OF ATTACHMENT.

See "ATTACHMENT."

WRIT OF ERROR.

1. The issuance of a writ of error and putting in bail did not operate as a *supersedeas*, or even stay of execution which had been levied before the issuance of the writ, but the Sheriff could proceed to a sale as if no writ of error had been sued out. Our statute (*Stats. of Minn., p.* 623 24. *sec.* 25.) provides a stay of execution in case of writ of error and bond, but the stay does not supercede the execution so as to annul what has been done under it; it simply checks the sheriff from proceeding further. The sheriff may retain the property levied upon until the decision of the Court above, or the order of the Court. *The North Western Express Company v Lindes*, 564.

2. It is only by appeal from the judgment that an abuse of discretion may be reviewed, and not by writ of error, as stated in *Fowler v. Atkinson*, 5 *Minn.*, 505. *Fowler et als. v. Atkinson*, 578.

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